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No. 85-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY;
JOHN KNIGHT, *et al.*; and
NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY; ALABAMA STATE BOARD OF EDUCATION; and GEORGE WALLACE, GOVERNOR OF ALABAMA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a decision which does no more than find liability on the part of certain defendants and direct that they submit for the district court's consideration a proposed plan for relief an appealable order?

2. Did the court of appeals act properly when it entertained an appeal from the order described above in a school desegregation case and, in connection with that appeal, stayed all proceedings in the district court, including the filing of a remedial plan and all further remedial proceedings, as well as the liability trial of several issues that had been severed from the main case?

PARTIES

The petitioners in this case are two historically black state universities in Alabama, and two groups of students, alumni and faculty of those universities.[1] They are plaintiffs in a suit seeking to dismantle the segregated system of public colleges and universities in Alabama. The principal respondents are two historically white state universities in Alabama.[2] They are defendants in the underlying

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[1] Board of Trustees of Alabama State University [hereinafter Alabama State University]; Board of Trustees of Alabama A & M University [hereinafter Alabama A & M University]; John F. Knight, Jr., Catherine Coleman, Charles R. Anderson, Alma S. Freeman, and John T. Gibson, et al., representing a certified class [hereinafter the Knight petitioners]; University Legal Defense Fund and National Alumni Normalite Association [hereinafter the Normalite petitioners].

Alabama State University and Alabama A & M University were originally defendants in the underlying suit filed by the United States, but they moved, successfully, to realign themselves as plaintiffs because they agreed with the claims of the United States and because they wished to represent the interests of their students, faculty, and employees in seeking, rather than resisting, compliance with the Constitution and laws of the United States.

The Knight petitioners and the Normalite petitioners are groups of plaintiff-intervenors who are or who represent students, faculty, and alumni of Alabama State University and Alabama A & M University, respectively. These petitioners were granted intervention in the district court (for all proceedings in the case of the Knight petitioners, and for post-liability proceedings in the case of the Normalite petitioners) on behalf of black citizens who either are or will be affected in various ways by the discriminatory acts of the respondents.

[2] Auburn University; and the Board of Trustees for the University of Alabama [hereinafter the University of Alabama]. The other active respondents are George C. Wallace, Governor of the State of Alabama; Wayne Teague, State Superintendent of Education; the Alabama State Board of Education; and Troy State University.

Each of these parties has filed a notice of appeal in the court of appeals, review of which is sought herein. However, none of these respondents except for Auburn University and the University of

suit.[3] Following a decision as to liability by the district court, the respondents are mainaining appeals in the court of appeals and have obtained stays of all further district court proceedings from the court of appeals.[4]

Alabama has sought stays from the court of appeals, with the exception of the State Board of Education, which sought and obtained the order of March 20, 1986, staying a liability trial on certain merits issues.

[3] The underlying suit was filed by the United States of America against the State of Alabama, its ten public colleges and universities, and various Alabama state agencies and officials, challenging the State's failure to dismantle its segregated system of public colleges and universities. Following the realignment of the two historically black universities and the addition of certain defendants, the respondents not listed in note 2, supra, are the following defendants: Jacksonville State University; Livingston University; University of Montevallo; University of North Alabama; University of South Alabama; the Alabama Public School and College Authority; the Alabama Commission on Higher Education; R.C. Bamberg, Robert H. Harris, Michael B. McCartney, Bill Nichols, John W. Pace, III, Frank P. Samford, Jr., Morris Savage, John Denson, Charles M. Smith, III, and Henry B. Seagall, II, in their official capacities as members of the Board of Trustees of Auburn University; T. Massey Bedsole, O. H. Delchamps, Jr., Aaron M. Aronov, Winston M. Blount, Yetta G. Samford, Jr., Cleophus Thomas, Jr., Garry Neil Drummond, John T. Oliver, William H. Mitchell, Martha H. Simms, Frank H. Brombey, Jr., Thomas E. Rast, Samuel Earle G. Hobbs, Sandra Hullett, and Ernest G. Williams, in their official capacities as members of the Board of Trustees for the University of Alabama; Harold R. Collins, R. Douglas Hawkins, Robert E. Kelley, Jack Wallace, John A. Teague, C. J. Hartley, Wallace D. Malone, Robert T. Wilson, Jack Giles, and Richard Dean, in their official capacities as members of the Board of Trustees of Troy State University; Jim Oakley, Jr., Anne Laura, R. Parker, Jane Burke, Mary Jo Callahan, Jimmy Faulkner, Clyde Foster, John M. Harbert, III, Ken Lott, Steven Means, Jack H. Rainer, and Bob Word, in their official capacities as members of the Alabama Commission on Higher Education; Sid McDonald, in his official capacity as State Finance Director; and Thomas Braswell, in his official capacity as Comptroller of the State of Alabama.

[4] The United States is a plaintiff aligned with the petitioners in the district court, but has taken no part in the court of appeals proceedings at issue here.

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No. 85-

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CITATIONS TO OPINIONS BELOW

Review is sought of a series of orders of the United States Court of Appeals for the Eleventh Circuit, which has left intact an appeal of a non-final order, and which (pending that appeal) has brought a school desegregation case in the district court to a complete halt, contrary to this Court's mandate that such cases be expedited.

To date, there are no opinions in the court of appeals, and the orders are unreported. The actions at issue include: (1) two orders dated February 14, 1986, staying the district court's order requiring the parties to submit

a remedial plan (reprinted at Appendix 1a-4a); (2) an order dated February 28, 1986, staying all other proceedings in the district court, including a trial on certain liability issues which had not been dealt with in the main trial (reprinted at Appendix 5a-6a); and (3) an order dated March 20, 1986, denying petitioners' motions to dissolve the stays and refusing to rule on petitioners' motions to dismiss the appeals, instead holding that these motions wou'd be "carried with the case" (reprinted at Appendix 7a-8a).

The opinion and order of the district court to which the above orders relate were issued on December 7, 1985 (and entered on December 9, 1985), and the order was modified orally by the district court at a hearing on January 19, 1986. The opinion and order are reported at 628 F. Supp. 1137 (M.D. Ala. 1985). The order is reprinted at Appendix 9a-10a; the relevant portions of the hearing transcript modifying the order are reprinted at Appendix 11a-12a; the lower court's opinion is reprinted at Appendix 13a-88a.

JURISDICTION

The orders of the court of appeals were entered on February 14 and 28, and March 20, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.

STATEMENT OF THE CASE

This is a school desegregation case in which the district court has tried the first phase, has found liability on the part of the respondents, and was beginning proceedings leading to the consideration of an appropriate remedy for the violations that it found. At that point, the respondents appealed to the court of appeals and obtained orders staying the district court from proceeding, either with the development of a remedy or with the trial of certain issues relating to liability which had been severed from the main proceeding. Petitioners have moved unsuccessfully to dismiss the appeals and to dissolve the stays.

The issue in this case involves the appealability of an interlocutory decision of the district court, and the propriety of entering stays pending appeal (especially an appeal over which there is no jurisdiction) in a school desegregation case. While this is an unusual stage at which to seek review in this Court, petitioners believe it is the most appropriate stage for a determination of the important issues of jurisdiction, delay, and judicial management presented by the orders under review.[1]

The case was filed after an investigation conducted by the United States Department of Education to determine whether Alabama's system of higher education, which had been rigidly segregated by law until relatively recent times, continues to be engaged in racial discrimination. As a result of that investigation, the Department of Education issued a Letter of Findings, concluding that the dual system of education is still in existence. When the State of Alabama did not act to cure the violations found by the Department of Education, the matter was

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[1] This is not a petition for certiorari before judgment in the classical sense, because that category usually involves review of district court decisions before a court of appeals has issued any rulings. By contrast, review of various rulings by the court of appeals is sought here.

referred to the United States Department of Justice, which filed this suit in 1983.[2]

As noted above, the original defendants included the State, certain state agencies and officials, and all of the four-year public colleges and universities in Alabama. Following realignment and intervention, the plaintiffs included the United States, the two historically black public universities, and groups of black students and citizens associated with the historically black universities or representing similar interests. The defendants included the state agencies and officials and the remaining public colleges and universities.

In a pretrial order, entered on February 1, 1985, the district court ruled that the case would be bifurcated, with a trial to be held on the issue of liability, and, if liability were found, a trial to follow on the issue of the appropriate relief. In a consent order entered on June 28, 1985, just before the liability trial began, the district court further held that two particular claims would not be tried —even as to liability—with the rest of the case, but would be severed for a separate trial.

Following extensive discovery, the district court conducted a month-long trial solely on liability in July 1985. Post-trial briefs were filed, and on December 7, the district court issued an opinion (entered December 9, 1985) finding liability in a number of respects.

The district court's opinion included a historical analysis of both the State's higher education system generally and of the individual institutions, a review of recent and

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[2] During the pre-trial proceedings, appellant Auburn University moved to recuse the district judge under 28 U.S.C. §§ 144 and 455. Those motions were denied but on a petition for a writ of mandamus the Court of Appeals ordered that the motions be heard by another judge. That hearing was held by Hon. David Dyer, sitting by designation, who issued a detailed opinion denying the motion on all counts. 582 F.Supp. 1197 (N.D. Ala. 1984).

current conditions at each of the institutions, and a consideration of several jurisdictional defenses. The district court's overall conclusion was that "the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; and that in other respects, the 'root and branches' of the dual system have not yet been eliminated." Appendix 16a.

In looking at the proof of liability, the district court made specific factual findings as a predicate for the subsequent fashioning of relief. As examples, the court found that the agricultural programs of Alabama A & M University had been starved financially for the discriminatory purpose of enhancing the strength of Auburn, a white land grant institution. Appendix 53a-61a. The court further found that the State's recent establishment of branch campuses of Auburn University and the University of Alabama next to the historically black universities put the latter schools at a disadvantage in seeking to attract the white students that would allow them to desegregate. Appendix 71a, 65a. Moreover, the court found that the funding formula and institutional classifications used by the State impeded the disestablishment of the dual system by freezing in the effects of past discrimination against Alabama State University and Alabama A & M University. Based on these and other findings, the district court concluded that "the State has not dismantled the dual system of higher education." Appendix 82a.

In order to move quickly in fashioning appropriate relief, the district court accompanied its liability opinion with an expeditious scheduling order for developing a remedy. The scheduling order assigned to the Governor and the appropriate state agencies the initial responsibility for drafting a proposed remedial plan for consideration by the court. Appendix 9a-10a. The two-page order indicated that certain of the colleges need not be included in the proposed remedy, or should be included only as to

part of the remedy.[3] The plan was to be filed on February 14, 1986, with the affected colleges to file responses within 15 days thereafter.

Following issuance of the district court's opinion, each of the principal respondents filed motions requesting the district court to certify its decision for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). These motions uniformly characterized the appeals they wished to take as "interlocutory." *See, e.g.*, the University of Alabama's motion, which was styled "Motion to Amend Interlocutory Order to Include Statement Prescribed by 28 U.S.C. § 1292(b) to Allow an Immediate Appeal and Motion for a Stay," and which included the sentence: "The above-described order does not contain the statement that, under such code section, must be included before an appeal from a noninjunctive interlocutory order may be taken."

After briefing and oral argument, the district court denied the motions to certify its opinion and order for an immediate appeal under § 1292(b). Order of January 22, 1986.

Meanwhile, preparations for the remedy phase of the case were going forward. The Alabama Commission on Higher Education (ACHE) scheduled a series of hearings and meetings around the State to receive suggestions in fashioning a remedial plan for presentation to the court on the due date of February 14. Many of the state colleges were heavily engaged in planning and preparation for the remedy phase, including in some cases attending

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[3] The order originally said that the plan should "utilize" the Department of Education's Revised Criteria for desegregating higher education; when several respondents objected to this provision, however, the district court indicated that the reference to the Revised Criteria had been intended solely as a useful guide, and further indicated that the reference would b deleted in order to avoid any misunderstanding. *See* Tr. of January 19, 1986, Appendix 11a-12a.

the ACHE hearings, meeting with ACHE officials, or transmitting proposals or other materials concerning the remedy. On February 14, 1986, as scheduled by the district court, two remedial plans were presented on behalf of the State.

Shortly before the February 14 due date, however, the five notices of appeal which are the subject of this petition were filed by the respondents (notwithstanding their recently expressed view that the December 9 decision was not an appealable order in the absence of § 1292(b) certification). The University of Alabama and Auburn University followed up their notices of appeal by moving for "a stay of execution of the Memorandum Opinion and Order entered . . . on December 9, 1985." Motion for a Stay of the Memorandum Opinion and Order of the District Court Pending Appeal, filed by Auburn University, February 13, 1986. The request of the University of Alabama was similarly phrased.

These stay applications were filed in the court of appeals on February 12 and 13, respectively. None of the petitioners had any opportunity to respond before they were summarily granted on February 14.[4] On that day, without notice and without opinion, the court of appeals entered orders granting the motions of the University of Alabama and Auburn University to stay the district

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[4] The petitioners were taken completely by surprise by the stay applications and the stay orders. Even the warning that would usually come from knowing that there had been an initial stay application in the district court was absent: the University of Alabama did not file a stay application pending appeal in the district court, on the ground that it had sought and been denied a stay the previous month on its section 1292(b) motion; Auburn University apparently filed a pro forma stay application in the district court on February 7, but to undersigned counsel's knowledge, no petitioner has ever received service of a copy. As to the applications filed with the court of appeals, no petitioner had even been served by the time the stays were granted, except for Alabama A & M University's counsel, who received 24 hours notice.

court's December 9 order directing the filing of a remedial plan. Appendix 1a-4a.

On February 20, 21, and 25, 1986, respectively, three of the petitioners (Alabama A & M University, the Knight intervenors, and Alabama State University) moved to dismiss the appeals for lack of jurisdiction and to dissolve the stays. Responses were filed by the University of Alabama and by Auburn University. On March 20, 1986, the court of appeals denied the motions to dissolve the stays and declined to rule on the motions to dismiss the appeals, ordering instead that they would be "carried with the case." See Appendix 7a-8a. These orders, like the earlier orders granting the stays on February 14, included no explanation of any kind.

Meanwhile, on February 13, 1986, the district court scheduled for March 3 a liability trial on the issues which it had severed earlier. Respondent State Board of Education moved in the district court and then the court of appeals for a stay of the trial of the severed issues. On February 28, that motion was granted by the court of appeals, which stayed "the trial scheduled for March 3 and all further proceedings in the district court." *See* Appendix 5a-6a.[5] That order, like the other orders of the

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[5] In August 1985, following the trial on the merits but before its decision, the district court granted a preliminary injunction against respondent State Board of Education's enforcement of two regulations. The State Board took an appeal from that preliminary injunction, for which there was jurisdiction under 28 U.S.C. § 1292(a). One of the regulations whose enforcement had been preliminarily enjoined (a specific faculty requirement for certifying teacher education programs) was one of the two severed issues to be tried on the merits on March 3, 1986. The court of appeals' order of February 28, which stayed the March 3 and all further proceedings in the district court, Appendix 5a-6a, was entered in the same words in the pending appeal from the preliminary injunction. Petitioners have no quarrel with the court of appeals' jurisdiction to enter that portion of the stay which stopped the trial of the issue related to the preliminary injunction—over which there was unquestioned, albeit limited, appellate jurisdiction.

court of appeals, includes not a word of opinion or other explanation. This petition followed.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the court of appeals' orders are in direct conflict with applicable decisions of this Court, *see* Supreme Court Rule 17.1(c), and are in direct conflict with decisions of other federal courts of appeals, *see* Supreme Court Rule 17.1 (a).

The subject matter of the conflict is the appealability of nonfinal orders, a subject which has repeatedly called for review by this Court because of its importance to sound judicial administration. In particular, although the court of appeals' orders below are in a sense interlocutory, this Court has granted review at this stage in other cases where there was a challenge to the maintenance of an appeal in a court of appeals. *See, e.g., Carroll v. United States*, 354 U.S. 394 (1957); *DiBella v. United States*, 369 U.S. 121 (1962). In those cases, this Court recognized that the importance of circumscribing and clarifying the lower courts' appellate jurisdiction warranted review by this Court at the point when the questionable appeal had first been filed and entertained, rather than counting on ultimate review after final judgments in the proceedings below.

Moreover, allowing this appeal to be maintained and to be effectuated by staying all district court proceedings seriously injures the petitioners. The net effect of the appellate court's rulings is that this school desegregation case has been halted completely in the district court, contrary to the longstanding requirement that school desegregation cases be treated with the utmost expedition. The orders below are not only unprecedented but are fundamentally at odds with the policies of this nation commanding swift pursuit of school desegregation.

I. The Court Of Appeals' Consideration Of An Appeal From A Nonfinal District Court Decision Conflicts With Decisions Of This Court.

The respondents' dubious appeals are classic attempts to draw the federal courts into piecemeal litigation, flouting the finality requirement which has been the hallmark of Congress' grant of appellate jurisdiction since September 24, 1789. This case illustrates perfectly the dangers of piecemeal litigation described by Justice Frankfurter:

> ". . . Congress from the very beginning has, by forbidding piecemeal disposition of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leadenfooted. Its momentum would be arrested by permitting separate review of the component elements in a unified cause." [*Cobbledick v. United States*, 309 U.S. 323, 325 (1940).]

The question in this case is whether a decision which does no more than find liability on the part of certain defendants and set a procedure for considering a possible remedy is a final order or one granting an injunction within the meaning of 28 U.S.C. §§ 1291 or 1292(a)(1). Petitioners believe the answer is clearly "No," and that these appeals should therefore be dismissed outright. The district court then could complete this case promptly and any party could then pursue a traditional appeal from any final judgment or injunctive order.[6]

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[6] Although the court of appeals has nominally left open the question of its jurisdiction over the appeals, Appendix 7a-8a, it has in fact exercised jurisdiction over the appeals by its sweeping stay orders halting all district court proceedings.

The basic requisite of federal appellate jurisdiction is finality. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Section 1291 of Title 28 specifically requires a final judgment, and Section 1292(a) provides a limited avenue of appeal from orders granting or denying injunctions—essentially a form of finality. The insistence on proper jurisdiction for appeals is so strong that courts are required to notice jurisdictional defects on their own motion, even if the parties wish to proceed.

Forty years ago, the Supreme Court described finality in terms that it has continually reiterated since then: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the Court to do but execute its judgment." *Catlin v. United States*, 324 U.S. 229 (1945).

In recent years there have been many efforts to relax the finality requirements, but these efforts have been repeatedly rejected by the Supreme Court. *See, e.g., Coopers & Lybrand, supra* (citing *Catlin*); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Richardson-Merrell v. Koller*, 472 U.S.—(1985).

While it is often said that finality is easier to define than to apply, the cases in which its application has been difficult have most often involved collateral orders, as was the case in each of the disputes cited in the previous paragraph. The cases most similar to this case are those involving stages of litigation, especially cases divided into a liability phase and a relief phase. In this area, this Court has spoken clearly and definitively in *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976).

In *Liberty Mutual*, plaintiffs challenged an employer's maternity policies as violative of Title VII of the Civil Rights Act of 1964. The district court entered summary judgment on the issue of liability and invited the plaintiffs to submit a proposed injunction order. The employer appealed, and although the Third Circuit entertained the appeal, this Court vacated the court of appeals' deci-

sion and remanded with instructions to dismiss the appeal for want of a final order, despite the fact that neither party had questioned the appellate jurisdiction. This Court examined a number of possible theories that could have supported the court of appeals' jurisdiction and rejected them all. Although it recognized that the issue of liability was fully disposed of, this Court repeatedly emphasized that the district court had "finally disposed of none of respondents' prayers for relief." 424 U.S. at 742. Where judgments [in that case a summary judgment] are limited to the issue of liability, this Court said, they are interlocutory: "where assessment of damages or awarding of other relief remains to be resolved [judgments pertaining to liability only] have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291." 424 U.S. at 744 (citations omitted).

The Supreme Court concluded by noting that any incentive to soften the finality requirement had been lessened because Congress had provided alternatives for hardship cases. That a case might not fit within one of the alternatives, however, was certainly no reason to relax the finality requirement of the traditional appeal:

> "We believe that Congress in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a 'final decision' for appeal in every case, and has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship. We would twist the fabric of the statute more than it will bear if we were to agree that the District Courts order of February 20, 1974, was appealable to the Court of Appeals." [424 U.S. at 746.]

The requirement of finality spelled out in the *Liberty Mutual* case is a familiar one which has been repeated often by this Court. *See, e.g., Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948). Only where the district court has spelled out the remedy in virtually every

detail, with nothing left but fairly ministerial acts, has this Court entertained review of a case in which the remedy has not been formally ordered.[7] The respondents have argued below that the district court's liability decision in this case meets that test because it makes detailed findings of fact. But detailed findings of fact on liability are a necessary predicate for the formulation of any remedy. If the district court's findings in this case were sufficient to make its decision an appealable order, this Court's *Liberty Mutual* decision would be a nullity, and piecemeal review would become routine.

II. The Court Of Appeals' Consideration Of An Appeal From A Nonfinal District Court Decision Conflicts With Decisions Of Other Courts Of Appeals.

Consistent with the principles described above, the other circuits have, with virtual uniformity, held that an order which simply decides liability without specifying the remedy is not appealable. Interestingly, the most unyielding expression of this rule has come in school desegregation cases. In this area of the law, the court below is in conflict with no fewer than four other courts: the Second, Third, Sixth and Eighth Circuits. If one goes outside the area of school desegregation, the court

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[7] That is the limited reach of Brown Shoe Co. v. United States, 370 U.S. 294 (1962). There, the lower court had decided on the remedy of divestiture, and only details remained. *Brown Shoe* is also generally recognized as resting largely on the peculiar commercial circumstances applicable to antitrust cases. For both reasons, respondents are unable to draw much support from *Brown Shoe*. Respondents have also tried to rest on some language about "flexibility" in Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), but the actual facts of the case have nothing to do with the multiple-stage litigation involved here but rather resemble more closely some of the collateral order cases. It is true that the case has often been cited for some rhetoric suggestive of lax appeal requirements, but this Court has restricted *Gillespie* rigidly to its facts, and has been sharply critical of efforts to extend *Gillespie* "beyond the unique facts of that case." Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.20 (1977).

below is in conflict with additional circuits as well, specifically the First, Fourth and District of Columbia Circuits.

The leading case on this point in the area of school desegregation is *Taylor v. Board of Education*, 288 F.2d 600 (2d Cir. 1961). In that case, Judge Friendly's scholarly opinion put the rule in a nutshell, at p. 602:

> "An order adjudging liability but leaving the quantuum of relief still to be determined has been a classic example of non-finality and appealability from the time of Chief Justice Marshall to our own . . ."

The Second Circuit has reiterated this rule in more recent times. *Spates v. Manson*, 619 F.2d 204 (2d Cir. 1980). The Third Circuit has stated the same rule. *Hoots v. Commonwealth*, 587 F.2d 1340 (3d Cir. 1978). The Sixth Circuit adheres to the same rule. *Reed v. Rhodes*, 549 F.2d 1050 (6th Cir. 1976). The Eighth Circuit has recently restated the same rule. *Liddell v. Board of Education*, 693 F.2d 721 (8th Cir. 1981). In cases not involving school desegregation, the same rule has been applied in the First Circuit, *Baetjer v. Fernandez*, 329 F.2d 798 (1st Cir. 1964), the Fourth Circuit, *United States v. Dember Construction Corp.*, 600 F.2d 11 (4th Cir. 1979) and the District of Columbia Circuit, *United States v. Western Electric Co.*, 777 F.2d 23 (D.C. Cir. 1985).

The only exception to this rule arises when the liability decision contains an injunction, in which case there is appellate jurisdiction under § 1292(a), or when the liability decision so specifically determines the remedy that, as a practical matter, it is final. Neither description applies to the district court's order in this case, which was a standard first-stage liability determination, looking toward full proceedings to determine the relief.[8]

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[8] Respondents have sought to analogize this case to Morales v. Turman, 535 F.2d 864 (5th Cir. 1976), rev'd on grounds other than

Finally, just as the Opinion and Order of the district court do not constitute a final decision reviewable under 28 U.S.C. § 1291, they are also manifestly not an injunction covered by § 1292(a)(1). The Order that the defendants would like to treat as an injunction is nothing more than a scheduling order. The direction that the State and ACHE file a proposed plan by February 14 is not an injunction, but simply reflects the district court's recognition that the state agencies are entitled to priority in the drafting of a plan to desegregate a state activity. If no plan had been filed by that date (and if there had been no stay), the consequence would not have been any coercive or punitive order, as one would expect to follow an injunction; rather, the district court would most likely simply have gone ahead—in light of the State agencies' abdication of their priority role—to devise some remedy from among those proposed by the remaining parties.

The issue of finality and appealability is not a mere technicality but reflects wise judicial policy against piecemeal litigation and unnecessary delay. When the scope of the remedy is completely speculative, as it is at this point in this case, it is impossible for a court of appeals to adequately assess the liability issues, much less the disposition of the case as a whole. Allowing the district court proceedings to conclude, on the other hand, allows the court of appeals to "consider the decision of the district court, not in pieces but as a whole, not as an abstract declaration inviting the contest of one theory against another, but in the concrete." *Taylor*, 288 F.2d at 605.

Nowhere is this basic principle of appellate jurisdiction more fundamental than in school desegregation cases. There the threat to judicial administration from

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finality, 430 U.S. 322 (1977), but that case is not controlling for the reasons ably explained by Judge Bork in Western Electric Co., 777 F.2d at 28.

piecemeal appeals is aggravated by the severe damage that delay can do to students and other victims of discrimination. In this case, the pendency of these appeals has already resulted in a substantial delay. The injury to the petitioners is great, and this, together with the injury to the courts, shows why district court liability determinations are uniformly held to be not final and not appealable.

III. The Court Of Appeals' Stay Orders Are In Conflict With Decisions Of This Court And Other Courts Of Appeals.

Petitioners are unaware of any authority in any court in support of an order staying proceedings at this stage of a school desegregation case. To the contrary, the decisions of both this Court and the various courts of appeals uniformly establish that, in the context of school desegregation, a stay of proceedings at this juncture is improper, even if, contrary to petitioners' view, the court of appeals does have jurisdiction over the appeals.

The irreparable harm that will result from the improvident entry of an order staying proceedings in a school desegregation case, together with the constitutional mandate that a discriminatory system of education be dismantled immediately, bars a stay in these proceedings. As in *Carter v. West Feliciana School Board*, 396 U.S. 226 (1969) (per curiam), in which this Court decided that a stay pending appeal on the merits was improper, it is necessary that the respondent "take all necessary clerical and administrative steps" to prepare for desegregation in the event that the pending appeal is not successful. *Id.* at 228 (citing *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969) (per curiam)). Minimizing any delay in the implementation of a desegregation plan is required, as this Court reasoned in the *West Feliciana* case, because "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no

longer constitutionally permissible." 396 U.S. at 20. *See also Buchanan v. Evans*, 439 U.S. 1360 (1980) (Brennan, Circuit Justice) (rejecting application for stay of desegregation order); *Keyes v. School District No. 1*, 396 U.S. 1215, 1216 (1969) (Brennan, Circuit Justice) (vacating a stay by the court of appeals); *Jefferson Parish School Board v. Dandridge*, 404 U.S. 1219, 1220 (1971) (Marshall, Circuit Justice); *Alexis I. du Pont School District v. Evans*, 439 U.S. 1375 (1978) (Rehnquist, Circuit Justice). Indeed, these principles have been clear-cut for many years. *Lucy v. Adams*, 350 U.S. 1, 2 (1955) (per curiam) (vacating stay of district court order pending appeal in desegregation case involving University of Alabama); *Meredith v. Fair*, 371 U.S. 29 (1962) (Black, Circuit Justice).

The rule against stays in school desegregation cases is equally firm in the courts of appeals. *See, e.g., Kelley v. Metropolitan County School Board of Education*, 436 F.2d 856, 862 (6th Cir. 1970), *cert. denied*, 409 U.S. 1001 (1972); *Frank v. Braddock*, 420 F.2d 690, 691 (5th Cir. 1969) (per curiam).

Indeed, the holdings are virtually uniform that even at later stages of a school desegregation case, i.e., even on the verge of implementing a remedy, stays should be granted only in the most exceptional circumstances, especially after a denial by the district court. In such a situation a party requesting such a stay must shoulder "a heavy burden for making out a case for such extraordinary relief." *Winston-Salem/Forsythe County Board of Education v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice). Bearing this admonition in mind, the absence of any real harm to respondents is telling.

The district court's order merely called for the submission of proposed methods of eliminating vestiges of a dual system of higher education in Alabama. It is this that the respondents told the court of appeal was irreparable injury. Nothing in the order guaranteed that

the plans submitted by the parties—or any other specfic plan, for that matter—would be ultimately approved and implemented by the district court. Thus, respondents' suggestions of possible harm, in the form of the possible disruption of existing programs or the "confusion" that may arise pending a final order of the district court, hardly meets the "heavy burden" that must be established for entry of a stay pending appeal, and clearly does not amount to irreparable harm. *See Taylor*, 288 F.2d at 603.

For example, Auburn claims only that "[t]he mere existence of [the district court's] Opinion and Order, and the publicity attendant thereto, are disruptive" to its operation. Auburn University's Motion for Stay at 9. Auburn's appellate papers additionally make clear that its appeal does not focus on any concrete injury arising out of a final decision, but on a "prospect [that] creates many uncertainties." *Id.* at 10-11. Similarly, the University of Alabama confesses that it is not appealing from a judgment or injunction; rather, it is appealing a "cloud of uncertainty." Affidavit of President John C. Wright, Exh. 7 to University of Alabama's Motion for Stay at 4.

Finally, in summarily granting the stays at issue here, the court of appeals acted in undue haste, and unaccountably offered no explanation for its decision. The heavy burden placed on an applicant seeking a stay pending appeal in a school desegregation case demands at a minimum that the court granting the relief articulate its reasons for providing such an extraordinary and disfavored remedy. *Cf. Taylor v. McKeithen*, 407 U.S. 191 (1972).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the stays should be dissolved. In the alternative, the stays should be dissolved pending the

court of appeals' further consideration of the issue of its jurisdiction to entertain the present appeal.[9]

Respectfully submitted,

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[9] Petitioners will soon file a motion in this Court to dissolve the stays pending consideration of this petition for writ of certiorari.

APPENDIX

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-7090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors, Appellees,

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and ALABAMA A&M UNIVERSITY,
Realigned Plaintiffs-Appellees,

versus

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

[Filed Feb. 14, 1986]

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The motion of appellants, Auburn University and its Board of Trustees, for a stay of the district court memorandum of opinion and order entered December 9, 1985 pending appeal is granted until further order of this court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors, Appellees,

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and ALABAMA A&M UNIVERSITY,
Realigned Plaintiffs-Appellees,

versus

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

[Filed Feb. 14, 1986]

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The motion of appellant, the Board of Trustees of The University of Alabama, for a stay of the district court memorandum of opinion and order entered December 9, 1985 pending appeal is granted until further order of this court.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-7090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors, Appellees,

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and ALABAMA A&M UNIVERSITY,
Realigned Plaintiffs-Appellees,

versus

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; and THE ALABAMA PUBLIC SCHOOL and COLLEGE AUTHORITY; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation,
Defendants-Appellants,

JACKSONVILLE STATE UNIVERSITY, etc., *et al.*,
Defendants.

On Appeal from the United States District Court for the Northern District of Alabama

[Filed Feb. 28, 1986]

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The motion of appellants, Alabama State Board of Education and State Superintendent of Education, Wayne Teague, for stay is GRANTED. The trial scheduled to begin March 3, 1986, and all further proceedings in the district court are STAYED until further order of this court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of other similarly situated,
Plaintiffs-Intervenors, Appellees,

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and ALABAMA A&M UNIVERSITY,
Realigned Plaintiffs-Appellees,

versus

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; and THE ALABAMA PUBLIC SCHOOL and COLLEGE AUTHORITY; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation,
Defendants-Appellants,

JACKSONVILLE STATE UNIVERSITY, etc., *et al.*,
Defendants.

On Appeal from the United States District Court
for the Northern District of Alabama

[Filed Mar. 20, 1986]

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The motion of appellee, The Board of Trustees for Alabama A&M University, to dismiss the appeals is carried with the case.

The motion of appellee, The Board of Trustees for Alabama A&M University, to dissolve the stays is denied.

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The motion of appellees, John F. Knight, Jr., et al., to dismiss the appeals is carried with the case.

The motion of appellees, John F. Knight, Jr., et al., to dissolve the stays is denied.

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The motion of appellees, The Board of Trustees of Alabama State University, to dismiss the appeals is carried with the case.

The motion of appellees, The Board of Trustees of Alabama State University, to dissolve the stays is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and ALABAMA A&M UNIVERSITY,
Realigned Plaintiffs

vs.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; JACKSONVILLE STATE UNIVERSITY, a public corporation; LIVINGSTON UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE UNIVERSITY OF MONTEVALLO, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation; THE UNIVERSITY OF NORTH ALABAMA, a public corporation; THE UNIVERSITY OF SOUTH ALABAMA, a public corporation; THE ALABAMA COMMISSION ON HIGHER EDUCATION; and THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY,
Defendants.

[Filed Dec. 7, 1985]
[Entered Dec. 9, 1985]

ORDER

In conformity with the Memorandum of Opinion issued contemporaneously herewith, it is ORDERED that the defendants STATE OF ALABAMA, GEORGE C. WALLACE, THE ALABAMA COMMISSION ON HIGHER EDUCATION, and THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY shall submit to the Court, not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama.

The plan shall utilize the United States Office of Education's "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education", published in 43 Fed. Reg. 6658 (Feb. 15, 1978). Livingston University, Jacksonville State University, the University of Montevallo, and the University of South Alabama shall not be included in the plan. Troy State University (Main Campus), the University of North Alabama, and the University of Alabama (Tuscaloosa and Birmingham) shall be included in the plan only to the extent of faculty desegregation.

Within fifteen (15) days after the submission of the plan, the affected institutions shall submit their comments or objections to the plan. Such comments or objections shall be limited to a maximum of twenty-five (25) pages.

A hearing on the plan shall thereafter be scheduled by the Court.

DONE this 7th day of December, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Court

PARTIAL TRANSCRIPT OF DISTRICT COURT HEARING, JANUARY 19, 1986

(Caption Omitted)

PROCEEDINGS

[6] THE COURT: This is the time that's been set for hearing on the various motions of the parties. At the suggestion of I believe it was Alabama A&M University, the—and I believe also the Knight intervenors and/or Alabama State University, the Court in its findings of fact embodied in the memorandum of opinion directed certain of the defendants in drafting a desegregation plan to utilize the United States Office of Education's revised criteria. The Court does not recall that the briefs of any of the defendants, the post-trial briefs, addressed that issue, although if I'm in error I'm sure it will be called to my attention.

The—all of the parties are now apparently in agreement that the Court should not require the utilization of that criteria by the defendants in the formulation of the plan, and the Court will therefore delete from its order dated December 7th, 1985 the first sentence of paragraph two which reads as follows: [7] The plan shall utilize the United States Office of Education's revised criteria specifying the ingredients of acceptable plans to desegregate state systems of higher education published in the—in the Federal Register. Are there any questions?

MR. POTTS: Could I—

THE COURT: Yes, sir.

MR. POTTS: —ask one, Your Honor? The—I believe the rest of the plaintiffs said even though they would agree to that deletion that they felt that this was a set

of guidelines from which any plan should be measured against or that they should be utilized in judging any plan the State presented. Does the Court have—expect this order to extend to that? Will the Court totally disregard those criteria, or is this simply in the first stage of the formulation of the plan that they can be disregarded?

THE COURT: It appears to me that you are suggesting that I cross a bridge before I get to it, and I don't propose to do that.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY and ALABAMA A&M UNIVERSITY,
Realigned Plaintiffs

vs.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; JACKSONVILLE STATE UNIVERSITY, a public corporation; LIVINGSTON UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE UNIVERSITY OF MONTEVALLO, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation; THE UNIVERSITY OF NORTH ALABAMA, a public corporation; THE UNIVERSITY OF SOUTH ALABAMA, a public corporation; THE ALABAMA COMMISSION ON HIGHER EDUCATION; and THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY,
Defendants.

[Filed Dec. 7, 1985]
[Entered Dec. 9, 1985]

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MEMORANDUM OF OPINION

Introduction

The merits of this case involve two issues: whether the State of Alabama operated a racially dual system of higher education, and, if so, whether the vestiges of the dual system have now been eliminated. In 1983, the United States initiated this action under 42 U.S.C. § 2000d, d-1, ("Title VI") and the Fourteenth Amendment to the United States Constitution against the State of Alabama, its publicly supported institutions of higher learning and related agencies and officials. To defendants, Alabama A&M University ("A&M") and Alabama State University ("ASU"), were granted leave to realign themselves as plaintiffs. After protracted, voluminous and often unnecessary discovery, the trial of the case commenced in, and consumed the month of July, 1985. Based on the evidence adduced at trial, and for the reasons which follow, the court concludes that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; and that in other respects, the "root and branches" of the dual system have not been eliminated.

I.

The Historical Development of the Dual System of Higher Education

As of May 17, 1954—the date of *Brown v. Board of Education*, 347 U.S. 482 (1954)—the system of higher education in Alabama consisted of (1) the University of Alabama, (2) Auburn Polytechnic Institute, (3) Alabama State Teachers College, (4) Alabama A&M College, (5) Florence State Teachers College, (6) Jacksonville State Teachers College, (7) Livingston State Teachers College, and (8) Troy State Teachers College. By July 2, 1965—the effective date of Title VI—the University of South Alabama had been added to the system. The historical development of each of these institutions shall be discussed in turn.

University of Alabama

The University of Alabama is the flagship institution of higher learning in the State of Alabama.

In the 1819 statute granting statehood to the Alabama Territory, an entire township was reserved and appropriated to the state legislature "for the use of a seminary of learning." The education article of the Alabama Constitution of 1819 provided that there

> shall be and remain a fund for the exclusive support of a State University, for the promotion of the arts, literature, and the sciences; and it shall be the duty of the General Assembly, as early as may be, to provide effectual means for the improvement and permanent security of the funds and endowments of such institution.

A year later, the legislature enacted a statute providing "That a Seminary of Learning be and the same is hereby established, to be denominated The University of the State of Alabama." The University was formally organized in Tuscaloosa in 1831. For the next 129 years, no other state-supported institution of higher learning carried the word "university" in its title.[1] Until the Reconstruction period of Alabama history, the University of Alabama was the only state-supported institution of higher learning in the state.

From its beginnings until 1956, the University of Alabama ("the University") did not admit black students, pursuant to the ironclad custom and policy of the State of Alabama requiring segregation of the races in all spheres of life. To be sure, the constitutional article and statute creating the University never referred to segregation; but the University board of trustees, consisting, among others, of the governor and state superintendent

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[1] The short-lived exception, Alabama Colored Peoples University, is discussed at pp. 20-22.

of education, was ever-mindful of and obedient to that provision of the 1901 Constitution which recites: "separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race".

In September, 1952, two black graduates of a private black college, Autherine Lucy and Polly Ann Myers, applied for admission to pursue graduate study at the University. The board of trustees considered the applications on June 1, 1953; and it deferred action on the matter, ostensibly pending a decision by the Supreme Court in *Brown*. The board communicated its action to Arthur Shores, counsel for the applicants, along with the suggestion "that his clients could find courses in subjects desired by them at Tuskegee Institute and the Alabama State College at Montgomery." *Brown* was decided on May 17, 1954; and a year later, the University had not acted on the application.

After a brief evidentiary hearing in the lawsuit, *Lucy v. Adams*, (No. 652, N.D. Ala.), Judge Grooms of this Court found that although there was no written policy or rule excluding blacks from the University, there was a tacit policy to that effect; and he enjoined university officials from denying Lucy, Myers or other similarly situated blacks "the right to enroll in the University of Alabama and pursue courses of study, solely on account of their race or color." The injunction was entered on July 1, 1955. The University appealed the case to the Court of Appeals and sought review by the Supreme Court; and on October 12, 1955, the United States Supreme Court denied review. *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955); *aff'd* 228 F.2d 619 (5th Cir. 1955); *cert. denied*, 351 U.S. 931 (1955).

The University denied admission to Lucy and Myers in the fall semester of 1955, on the ground that their applications were tardy. Finally, on December 30, 1955,

Judge Grooms ordered the university officials to admit Lucy for the second semester, commencing February 3, 1956.

President Carmichael of the University summarized its sentiment:

> [T]he court case which was decided on December 25, 1955, had been in litigation for three and a half years. . . . During that period the Board of Trustees sought through all legal means to maintain the historic tradition of segregation which they conscientiously believed to be in the best interests of all concerned. * * *
>
> Finally, when the last legal battle was decided adversely the trustees were faced with two alternatives, yielding to the court's decree or defying the law. * * * [The lawyer-members of the Board of Trustees] as well as other members felt they had no choice but to comply with the court's decree. Accordingly, the Board voted to permit one of the litigants to enroll as a student in the University.

Autherine Lucy did indeed enroll at the University. Despite the denial of dormitory space and dining hall privileges to her by the board of trustees, she attended the first three days of classes. On the third day, February 6, 1956, a mob assembled and attacked her. She was hit with an egg; but due to the intervention of campus patrolmen, she escaped serious injury. That night, the board of trustees met and voted to exclude Lucy from attending classes until further notice. This action was defended as a safety precaution under the police power of the university.

By February 29, the trustees had not lifted their order of exclusion; and following a show cause hearing that day, Judge Grooms ordered that "the order of suspension or exclusion" be terminated by March 5, 1956. He nonetheless found that the university trustees and

officials had neither been derelict in their duty nor defiant of the earlier injunction, but that their action ". . . was taken in a good faith attempt to so protect the plaintiff and others." [2]

On the same day as Judge Grooms issued his order, the Board of Trustees met and unanimously adopted a resolution permanently expelling Autherine Lucy because of statements in her pleadings in which she expressed her belief that university officials had suspended her because of her color, and that they had conspired with others to violate the Court's order requiring her admission. Judge Grooms held that the Board of Trustees had properly expelled Autherine Lucy.

The University thus reverted to its all-white status; and remained so for another seven years.

In early 1963, three black students, Vivian J. Malone, Sandy English, and Jimmy A. Hood applied for admission to the University's main campus; two others, Marvin P. Carroll and Dave M. McGlathery, applied for admission to the University's Huntsville Extension Center. Their applications were not timely processed. On May 16, 1963, this Court ordered the trustees to process the

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[2] The board member who testified in support of the indefinite suspension was of the opinion that Autherine Lucy "and the people who were sponsoring her and who were seeking to have her go to the University of Alabama" were deliberately trying to cause trouble and incite riot. Thurgood Marshall, co-counsel for Lucy, pressed the point:

> Q Mr. Caddell, what was done by Autherine Lucy or anybody connected with [her] on Monday, February 6 that was unlawful?
>
> A Well, Autherine Lucy came there in a Cadillac automobile; she had chauffers with her; she walked about on the campus in such a way as to I suppose, be obnoxious and objectionable and disagreeable.

AMX 266, Transcript of 2/29/56 Hearing, p. 179.

applications and to admit the applicants if they were qualified. The Board minutes reflect that

> The Board was faced with a choice between the admission of some of the applicants or the outright disobedience of the order of the Federal Court with consequent prison sentences and other severe penalties for the Dean of Admissions and any successor appointed for him, and everyone else officially connected with the University, which punishment would not prevent such admission. It has therefore directed the Dean of Admissions to notify two negro applicants who have been found qualified of their admission to the University, one at the Huntsville Center and one at Tuscaloosa for the sessions which begin June 10, 1963.

The meeting at which this action was taken was called by Governor George C. Wallace and held at his office at the State Capitol in Montgomery. The Governor "wished his vote recorded against admission because of his position as the constitutional executive office [sic] of the State of Alabama responsible for the peace and tranquility of the State." USAX 9c.

Thereafter, in an effort to prevent the federal court-ordered desegregation of the University,[3] Governor Wal-

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[3] It has been contended that the Governor was not motivated by a desire to prevent desegregation; rather that he was simply seeking to raise a grave constitutional issue concerning the usurpation of state powers by the federal government. A letter written by the Governor three months after the event lays to rest this attempted revision of history. In that letter, the Governor says, *inter alia*,

> As we read the statistics of our Courts, Public Health Departments, we find that a vast majority of the crime committed in this area has been committed by members of the Negro race. . . . Their health records record the fact that a vast percentage of people who are infected with venereal diseases are people of the Negro race. Statistics from the Health Department also

lace publicly announced that he would "stand in the schoolhouse door" when the black students presented themselves for admission.

On June 10, 1963, United States President John F. Kennedy sent the following telegram to Governor Wallace:

> I am gratified by the dedication to law and order expressed in your telegram informing me of your use of National Guardsmen at the University of Alabama. The only announced threat to orderly compliance with the law, however, is your Plan to bar physically the admission of Negro students in defiance of the order of the Alabama federal district court and in violation of accepted standards of public conduct. State, city, and university officials have reported that, if you were to stay away from the campus, thus fulfilling your legal duty, there is little danger of any disorder being incited which the local town and campus authorities could not adequately handle. This would make unnecessary the outside intervention of any troops, either state or federal. I therefore urgently ask you to consider the conse-

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reveal the fact that an exceedingly high percentage of illegitimate children in this state and surrounding states are of the Negro race. We find that the Negroes are not aggresive in the respect of making progress and their own ability to live among themselves. * * * It is our firm belief that when God in Heaven made the Negro black, he meant for him to stay that way. Likewise when he made the white race white, He meant for them to be a pure race. *It is our further belief that when the two races mix and mingle in schools, from the first grade through college, this mixing will result in the races mixing socially,* which fact will bring about intermarriages of the races, and eventually our race will be deteriated [sic] to that of the mongrel complexity. * * * . . . if we can manage to keep our races from mixing, we shall always have pure races.

Letter from Governor Wallace to Art Wallace, dated 9/13/63. AMX 14G. (emphasis added).

> quences to your state and its fine university if you persist in setting an example of defiant conduct, and urge you instead to leave those matters in the courts of law where they belong.

AMX 14B.

The Alabama National Guard was federalized by the President shortly thereafter. On the following day, when Vivian Malone and Jimmy Hood (escorted by United States Marshals) approached the Administration Building, they were met by Governor Wallace at the entrance. He was allowed to read a short statement; and the federalized Commander of the Alabama National Guard then asked the Governor to step aside. The Governor accommodated the request.

In the words of Governor Wallace, "At 3:33 P.M. (cst) June 11, 1963, through the use of Federal Troops [President Kennedy] assumed full responsibility for the presence of Negro students. . ." AMX 14E. Three days later, the President wired the Governor:

> Regretfully, it was necessary to send troops to Tuscaloosa to enforce the courts orders. Maintenance of law and order, however, remains your legal and moral responsibility. I know you were opposed to the admission of the Negro students, but that is now passed. They are attending the university, and I would like to withdraw the troops as soon as possible.

AMX 14A.

Governor Wallace's June 17, 1963 response to the President reads:

> I can and will guarantee that there will be no sustained violence in Alabama, but with our limited resources, physical and financial, Alabama cannot insure absolutely the personal safety of individual students. Surely you realize that a continuous cause

> of the tension in Alabama is the presence of the three Negro students on the campuses of the University, and I suggest that you immediately secure their withdrawal.
>
> * * *
>
> You have created the situation existing in Tuscaloosa, Alabama. You must assume the responsibility. You cannot usurp the powers reserved to the State of Alabama and then place the burdens thereby created on my shoulders.

AMX 14H

The evidence does not disclose the date on which the federal troops were removed.

On June 12, 1963, Governor Wallace reminded President Rose of the University that on the preceding afternoon, "President Kennedy with the use of armed Federal troops assumed control of the campus of the University of Alabama which includes the campus at Huntsville." In view of this "illegal and unwarranted military occupation," the Governor decided that he would not "stand in the door" of the Huntsville campus when Dave McGlathery presented himself. He promised that "we will continue relentlessly our fight against forced integration of the University of Alabama." AMX 15B.

The record evidence does not pinpoint the date on which the fight ended; but by 1965, there were 31 black students enrolled at the University of Alabama. Two years later, that number had increased to 119 blacks out of a total student population of 12,251.

Auburn Polytechnic Institute

Auburn University's roots extend to the East Alabama Male College, a denominational school which was started in 1859. Closed during the Civil War, the school reopened in 1866. In 1872, the Methodist Church offered

the school to the state; the state legislature accepted it and named the school, "the Agricultural and Mechanical College of Alabama." It was designated as the land grant college of Alabama under the terms of the 1862 Morrill Act. The 1875 and 1901 Constitutions of Alabama expressly recognized the status of the school. Women were admitted in 1892; and in 1899, the name was changed to the Auburn Polytechnic Institute. In 1960, the name was again changed, this time to Auburn University ("Auburn").

From its inception until 1963, Auburn did not admit black students.[4]

In 1962, Harold A. Franklin, a black graduate of Alabama State University, applied for admission to the graduate school of Auburn University. He was denied admission by the Dean of Auburn's graduate school on the stated ground that Franklin's undergraduate degree was awarded by an unaccredited institution. In *Franklin v. Parker*, 223 F.Supp. 724 (M.D. Ala. 1963), Judge Frank Johnson ordered Auburn to admit Franklin and

> . . . other qualified Negro applicants to the Auburn University Graduate School, without regard to any statute, policy, practice, custom and usage which may be contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Id. at 728.

Governor Wallace, as chairman of the Auburn Board of Trustees, then intervened and, through his effort, Auburn University refused to grant dormitory space to Franklin, although the space admittedly was available.

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[4] Because of this policy and custom which had the force of law, the legislature designated the Huntsville Normal School as the land-grant college for blacks in 1891 so that Auburn might continue receiving Morrill Act funds.

AMX 12A. Judge Johnson ordered Auburn to provide the dormitory space forthwith. Franklin was accordingly admitted to Auburn University on January 2, 1964.

Resistance to the desegregation at Auburn in the early sixties was spearheaded by the chairman of its board of trustees, the Governor. Dr. Ralph Draughon, President of Auburn, did not always agree with the Governor's tactics. When Draughon wrote to the Governor protesting the action of State Troopers in barring federal agents from the campus during the Franklin admission, the Governor responded:

> Of course, you and I were never in agreement relative to the proposition of integration at Auburn. As you will remember, it was your suggestion that Auburn voluntarily admit a Negro student. This never did and never will receive my approval.
>
> I will say that it is difficult for me to understand the lack of cooperation at Auburn University in that through my efforts the University now has its largest appropriation in the history of the State. My efforts in behalf of Auburn University have appparently had no effect on your attitude.

AMX 12B, p. 3.

The Board of Trustees named a new president in the following year. The new president was the first to sign a statement endorsing the Governor's opposition to the 1966 HEW Guidelines for school desegregation;[5] and when the three-judge court handed down its decision in *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), the president of Auburn was again the first to sign a petition urging the Governor and the State Attorney General to request a stay of the

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[5] The President of the University of Alabama apparently refused to endorse the Governor's position.

judgment pending an appeal of the decision to the United States Supreme Court. AMX 18, 20.

Auburn was not a party in *Lee v. Macon*, and it had no legally cognizable interest in the case. Of course, these public positions of Auburn's president on matters of school desegregation did nothing to dispel the image of Auburn as an institution more concerned with preserving segregation than opening its doors to black students.

By 1970-71, there were only 71 (.6%) blacks among the 1,484 undergraduates enrolled at Auburn; there were 10 black graduate students out of a total of 662.

Alabama State Teachers College [6]

The institution now known as Alabama State University had its origins in Marion, Alabama. In 1867, Jabez L.M. Curry,[7] ex-confederate officer and former president of Howard College of Marion, organized a mass meeting of blacks in Selma, Alabama, for the purpose of setting up a school for blacks. As a result of this meeting, a black school was set up at Marion in that year, with the assistance and financial support of the Conservative Party. In July of the following year, the Alabama Board of Education made an appropriation to the Marion Normal School from the black share of the common school fund.

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[6] The historical facts concerning Alabama State and A&M are based on the evidence and Horace Mann Bond's *Negro Education in Alabama: A Study In Cotton and Steel.* New York, Antheneum, 1969; Robert G. Sherer's *Subordination or Liberation: Development of Conflicting Theories of Black Education in 19th Century Alabama.* University of Alabama Press, 1977. These books are included in the bibliography of Auburn's land grant expert, Dr. William Warren Rogers; and pursuant to A&M's Request For Judicial Notice, they are so noticed.

[7] Curry later became the General Agent of the Peabody Fund and administration head of the Slater Fund, which donated millions of dollars to black and white schools in Alabama during the period 1868-1914.

In November, 1871, Peyton Finley, the black member of the State Board of Education, introduced two bills to the board. The bills provided for the creation of four schools for black teachers, and an equal number for white teachers. The bills were passed a month later; and $4,750 was divided among the black normal schools at Montgomery, Sparta, Marion and Huntsville.[8]

In 1872, the normal school at Montgomery was not funded; but the appropriation for the school at Marion was made permanent.

Peyton Finley was "a strenuous advocate of the establishment of a University for Negroes in the State, to do for the Negro what the University of Alabama purported to do for white persons." *Bond*, 107. At the first session of the Board of Education which he attended as a member, he presented a resolution urging the creation of a black university and petitioning Congress "for a grant of public lands in aid of such a University." Nothing ever came of this resolution. Later in the year (1871), Peyton introduced a similar bill; but a substitute amendment was adopted which doubled the appropriation for the school at Marion, in lieu of making it a university. Finally, in the latter part of 1873, a bill to establish a "State Normal School and University" was passed by the State Board of Education.[9] Lincoln Normal School, which had been operated by the American Missionary Society since 1866, was donated to the State for use as the campus of the new university; and a board of directors, consisting of the state superintendent of education and five black citizens, was the governing body of the university.

In 1874, there were one hundred black students enrolled at "normal University." Its appropriation of

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[8] $4,500 was to be divided among the white schools.

[9] During this period of Alabama history, the State Board of Education was empowered to enact laws dealing with education.

$2,000 (compared with the $2,400 year income of the University of Alabama) was doubled the following year. The school had three white faculty members; and the newly elected Democratic school superintendent wrote:

> The normal school at Marion is designed to become a University for the colored race in the State; and it is not doubted that its facilities for furnishing the higher education to this race will be amplified as the demand therefor becomes apparent.

Bond, 110.

In 1878, William Burns Paterson was elected president of the State Normal School and University at Marion. Of Scottish birth, he had come to the United States as an immigrant eleven years earlier. He worked at odd jobs from New York to Hale County, Alabama, in which he settled in 1870. Over the opposition of local whites to a white person teaching black people, Paterson set up the Tullibody Academy in Greensboro for the education of black freedmen. Tullibody Acadamy was so well-respected seven years later that Burns was chosen to head the State Normal School and University, also known as Lincoln Normal University.

The first curriculum at the Marion school was classical only. Between 1880 and 1885, the school developed a carpentry course for the male students. By 1885, Lincoln Normal University consisted of a main building, a small dormitory, and the president's residence. There were 10 faculty members—the only black being the head of the Industrial Department. Its enrollment in that year slightly exceeded 300; it had 17 in the graduating class.

In each of the next two years, pivotal events charted the course of the school. In December 1886, a riot ensued after several white cadets at Howard College (also located in Marion) shoved a Lincoln student off the sidewalk as they walked abreast. In apparent retaliation,

the main building at Lincoln School was destroyed by arson; and the Marion City fathers demanded of the legislature that the school be either closed or moved to another city.

The legislature responded by appointing a committee, chaired by the Governor, to determine an appropriate place for the relocation of the school. Montgomery, Selma and Birmingham were considered; but the advocacy of the *Montgomery Advertiser* resulted in the decision to relocate the school in Montgomery in 1887.[10]

On February 27, 1887, the Legislature enacted a bill "to establish the Alabama University of Colored People, and to provide for its support and maintenance." The Alabama Supreme Court described the legislation:

> It establishes a Uinversity, with the implied privileges and powers appertaining to such institutions of higher learning, and as contra-distinguished from high schools, and even colleges. It is not subject to the supervision of the Superintendent of Education, in whom the constitution vests the supervision of the public schools.
>
> It provides for the appointment of trustees, who are empowered to elect a faculty, and such officers and agents as they deem necessary; to discharge any member of the faculty, or officer or agent, at their pleasure; to prescribe their duties, and fix their compensation; and generally, to govern and control the faculty and the University, "so that the students therein may be taught in the best manner possible the things they are to live by, preferring always the

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[10] Not without significance, Booker T. Washington of Tuskegee Institute (which had been founded with a $2,000 state appropriation only six years earlier and was only forty miles from Montgomery) secretly lobbied against relocating the school in Montgomery.

> English language and the industries, to an education for culture only.

Elsberry v. State, 83 Ala. 614, 619 (1887).

Upon the creation of Alabama Colored Peoples University at Montgomery, President Paterson secured the assistance of local black leaders; and on October 3, 1887, the university opened in the basement of Beulah Baptist Church with ten teachers and about 400 students.

A few months after the opening of the University, in February, 1888, the Alabama Supreme Court held in *Elsberry*, that the act creating the university was unconstitutional, on the ground that the $7,500 annual appropriation for the university was to be taken from the school funds earmarked for the colored race. The Court reasoned that the school funds apportioned between the races must be apppropriated for public schools; and that the Alabama Colored Peoples University was not a public schoool.[11]

Alabama Colored Peoples University therefore received no state funding for the 1888-89 school year.

On February 23, 1889, the Legislature reacted to the *Elsberry* decision by creating a State Normal School for Colored Students to be located in Montgomery with an annual appropriation from the colored school fund of $7,500. The State Board of Education was assigned the responsibility of operating the school. Three months later, the black community in Montgomery donated $3,300 in cash and 6½ acres of land to the normal school. The school moved into its new quarters shortly after the beginning of the 1889-90 school term.

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[11] The opinion was written by Justice Clopton, a former representative in the Confederate Assembly and former president of the East Alabama Male Institute (the predecessor to Auburn Polytechnic Institute).

From the turn of the century until the forties, the State Normal School for colored students fared better at the hands of the State Board of Education and the State Legislature than the Agricultural and Mechanical College for Negroes.

By 1902, 56% of the 229 graduates of the State Normal School for blacks were teachers; only 25% of the 736 A&M graduates were teachers.

Between 1920 and 1929, all of the normal schools in Alabama operated under a two-year curriculum. In 1929, the normal schools became teachers' colleges with four-year courses of study; from that year until 1969; the black teachers college in Montgomery was known as "Alabama State Teachers College."

In January, 1949, Governor James E. Folsom appointed a "Committee on Higher Education for Negroes in Alabama." The Committee consisted of 35 distinguished citizens of Alabama, including the presidents of the black state-supported institutions, the State Superintendent of Education, and a Richard T. Rives of Montgomery, who was subsequently appointed to the United States Court of Appeals for the Fifth Circuit. In its final report, the Committee recommended that Alabama State College for Negroes "be developed as the State's University for Negroes," and that a law school for Negroes be established there. It further recommended that Alabama State be appropriated $695,000 annually (including funds for the law school and expansion of undergraduate and graduate curricula); and that $2,465,000 be appropriated to the college for capital outlay. These recommendations were never acted on by the legislature.

By the fifties, Alabama State was offering the master's degree in education. Its undergraduate degree fields included secretarial science and music education. The curriculum had been broadened "to give preparatory college training for further study in medicine, law, theology, social work, library science, dentistry and nursing."

Alabama State was not accredited by the regional accrediting agency, the Southern Association of Secondary Schools and Colleges, until 1966; and its name was changed to Alabama State University in 1969. It remained under the control of the State Board of Education until 1975. Pursuant to the policy of its governing board, Alabama State could not admit white students until 1967; its first white student enrolled in the following year.

Alabama A&M College

William Hooper Councill was the single most important force in the origin and development of what was later to become Alabama A&M University. He was born into slavery; and by the time of emancipation, his family lived in Jackson County, Alabama. Largely self-taught, he moved to Huntsville in 1869 and opened a rural school for blacks about four miles west of Huntsville. In Huntsville, Councill became active in Reconstruction politics and was elected to the position of reading clerk in the Alabama Legislature, where he served from 1872-74. He was admitted to practice law in Alabama in 1883.

Two years after the State Board of Education enacted Peyton Finley's bill creating segregated normal schools, the Huntsville Normal School was established, with an annual appropriation of $1,000. In 1875, the school formally opened with Councill as its principal, and 61 students. For the next seven years, the classes were conducted in rented houses in Huntsville.

By 1882, the enrollment at the normal school had grown to 200; and the annual state appropriation had grown to $2,000. A $3,000 parcel of property had been purchased, and the two-story building on it had been remodeled for use as a school building.

With $1,000 donated to the school by the Slater Fund, Councill inauguated [sic] an industrial department of the normal school by 1885. Fifty-five students were receiving

industrial training in carpentry, painting, printing, sewing, and horticulture. In the same year, the Legislature doubled the appropriation to the school;[12] and its name was formally changed to "Huntsville State Colored Normal and Industrial School."

Councill and the students of the Huntsville Normal and Industrial School were involved in separate racial incidents in 1887. While riding on a first-class railroad car from Tennessee to Atlanta in the summer of 1887, Councill was roughly evicted from the first class section. He filed a complaint with the newly created Interstate Commerce Commission, which ruled that Councill had not been treated equally and directed the railroad to provide equal service for blacks in the future. This incident caused no real problem with whites in Alabama.

During the same summer, however, several of the students of Huntsville Normal innocently entered the first-class railcar on the train from Huntsville to Decatur. The porter and conductor strongly protested; and, upon learning of the incident, the resulting hue and cry from local whites was so great that Councill tendered his resignation as principal. The resignation was promptly accepted by the all-white commissioners of the school, and they appointed a new principal. There followed such a groundswell of moral and financial support for Councill from within and outside the state that the commissioners were persuaded to reinstate Councill as principal of the school in 1888. He remained in this position until his death in 1909.

Congress enacted the Second Morrill Act in 1890, after it became clear that the Southern states had denied black citizens the right to attend the First Morrill Act land grant colleges. The Alabama Legislature set up a commission to determine which of Alabama's three black

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[12] The state appropriation was not increased for the next third of a century.

state-supported normal schools [13] would be designated as the black land grant school. Tuskegee Institute had the decided advantages: it had more buildings, more students, and the support of both of Alabama's senators.[14] These considerations were not enough to overcome the legislature's reaction to a speech of Booker T. Washington delivered in Montgomery ten days before the decision was to be made. In that speech, Washington attacked as unfair to blacks the School Fund Apportionment Law enacted by the legislature earlier that year; and, to the further consternation of the legislature, he challenged the practice of providing separate railroad cars for blacks. Councill, with the assistance of the ex-Confederate officers on his board, then successfully urged the Legislature not to grant the funds to a black school headed by a white man (i.e., Alabama State Normal School for colored students at Montgomery).

Washington's speech having rendered Tuskegee ineligible,[15] and President Paterson's color having disqualified Alabama State Normal School in Montgomery on February 13, 1891, the Huntsville State Normal School was designated by the legislature as the land grant school for blacks in Alabama.

After it had been designated as the black land grant school in Alabama, the commissioners of the Huntsville

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[13] Actually, by that time Tuskegee Institute, which had started as a normal school in 1881 with a $2,000 state appropriation, depended on Northern philanthropists for virtually all of its income.

[14] Senator Poigh introduced an amendment to the Act to permit the funds to go to schools which did not have "college" in their names; Senator Morgan publicly stated that the funds should go to Tuskegee, which has ". . . done more for the youthful colored population in that State than can be claimed by almost any other State in the South."

[15] Washington apparently learned his lesson well. Five years later, he delivered his famous Atlanta Exposition speech, in which he urged blacks to forego social and political equality with whites and to develop industrial skills.

Normal School sold the campus in the City of Huntsville and moved the school to a new location four miles north of the city. This new site, at Normal, Alabama, had once been a plantation, race course, and an inn. It had several buildings which were used by the new school as faculty homes, offices, and shops. Palmer Hall, Seay Hall, a barn and a dairy were all constructed between March and August of 1891; and on September 1, the school opened at the new location.

Between 1893 and 1896, Councill became convinced that it would be impossible for blacks to attain full equality in the United States; and in his writings and speeches, he urged a gradual migration of blacks to Africa. This philosophy caused his school to lose both black and white support.

Five years after having designated the Huntsville Normal School as the state land grant school for blacks, the Legislature decided to establish two "agricultural experiment stations for the colored race and to make appropriations therefor." One of these was established at the Alabama State Normal School for colored students at Montgomery, to be operated by "its present board of trustees." The other was established at Tuskegee Normal and Industrial Institute; to be operated by a "board of control" consisting of the state commissioner of agriculture, the president of Auburn Polytechnic Institute, and the members of the Board of Trustees of Tuskegee Institute "who reside in the town of Tuskegee, Alabama." The 1896 decision to exclude the Huntsville Normal School was the beginning of nearly three-quarters of a century of rather blatant discrimination by the legislature and the State Board of Education against the black land grant school.[16]

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[16] Ironically, as Councill's (and thus A&M's) stock fell with the legislature, Booker T. Washington's (and therefore Tuskegee Institute's) stock rose.

In the same year, the Legislature changed the name of the school to the "Agricultural and Mechanical College for Negroes," and gave it the power to confer degrees.

From its inception until the summer of 1920, the governing board of A&M was a three-member board of commissioners, with the governor and the state superintendent of education as ex-officio members of the board. The 1894-95 catalog of the institution reflects that

> [t]he three Trustees or Commissioners representing the State of Alabama are all men of superior character, education, and wealth. All of them were slave-holders, and commissioned officers in the Confederate army.

SX 139, p. 17.

In 1920, the school was placed under the authority of the State Board of Education, where it remained until 1975.

Upon the death of Councill in 1909, his son-in-law, Walter S. Buchanan, was appointed to succeed him.

The Smith Lever Act, providing funds for agricultural extension work, was enacted by Congress on May 8, 1914. At that time, A&M's School of Agriculture was already engaged in extension work, and had been so involved since the 1890's. The 1913 catalog described this work:

> The agricultural extension work is intended to reach and help the large mass of farm workers among our people who cannot attend school. The following lines of extension work have been conducted during the past year and arrangements are being made to enlarge the work another year:—
>
> 1. Farmers' Institute for the adult farmers.
> 2. Boy's Corn clubs for the boys from nine to eighteen years of age.

3. Girls' Tomato clubs for girls from nine to eighteen years of age.

4. School Farm clubs for the purpose of extending the school term and improving the condition of the school.

AMX 38, pp. 23-24.

In 1905-06, there were over 160 students enrolled in the four year college and normal departments of A&M. In 1913-14, there were only 36 students enrolled in the "Teachers' College" of A&M. There were 27 such students in 1914-15. During the same period, over 100 of the A&M students were enrolled in agriculture courses.

Nonetheless, A&M was not designated a co-recipient of Smith Lever funds. After losing in these efforts, A&M's financial condition progressively deteriorated. Its annual $4,000 state appropriation—lower than of any other state institution [17]—was not increased by the legislature until the school was placed under the control of the State Board of Education.

In fact, in 1918, the legislature appropriated only $1,000 to A&M.

In the next year, A&M was placed under the control of the state board of education.

A&M did not fare much better under the state board of education. In the same year as it came under board of education control, it was reduced to a two-year curriculum-with emphasis on agricultural and industrial education. It did not resume its status as a four year school until 1939; while all the "Class A" schools and

[17] In 1916 and 1917, Alabama State's annual appropriation was $15,000. The white normal schools were appropriated $20,000.00 on the average in those years. The University of Montevallo received $54,427.68; and the University of Alabama received an annual $71,000 appropriation. Auburn's $87,280 was the highest state appropriation in those years.

Alabama State reverted to four year teacher's colleges ten years earlier.

When the legislature established a graduate school in agriculture for blacks in 1945, it was placed at Tuskegee, rather than A&M. A total of $300,000 was appropriated for the establishment of this school; and a line-item appropriation of $100,000 was authorized.

Four years later, the legislature authorized the state board to provide courses for blacks in areas such as chemistry, engineering, vocational agriculture, and "such other educational services which in the opinion of the Board of Education is in great enough demand to justify a contract." SX 162. Instead of developing these courses at A&M, the Board of Education contracted with Tuskegee Institute for these courses.

By 1943, there were 562 students at A&M. Fifty-four of these were in agriculture, 118 were enrolled in mechanic arts, and 231 were in home economics. Further,

> several classes were taught for out-of-school rural youth in farm machinery repair, blacksmithing, wood working, and general farm production and conservation.
>
> A Farmers' Conference was held in February 1943, bringing to the campus more than 300 farm men and women. * * * [T]he extension division served 179 off-campus workers.

SX 168.

In 1948, A&M's name was changed to "Alabama Agricultural and Mechanical College." In 1969, the board of education gave it its present name. It was accredited by the Southern Association of Secondary Schools and Colleges in 1963.

Until the 1967 injunction in *Lee v. Macon*, A&M did not admit white students.

University of South Alabama

Beginning in 1942, the University of Alabama offered extension courses to whites in Mobile—the second largest city in the state. At that time, and until 1963, there was no other state-supported four-year institution serving whites in the Mobile area.[18] By 1963, the University's Mobile Center accommodated some 1,500 part time students.

The University of South Alabama ("USA") was created by the legislature in 1963. Upon its creation, the director of the University Mobile Center became its new president, and upon the request of the board of trustees of USA, the University Mobile Center ceased operations in 1964.

When USA commenced operations in 1964 and for the next three years, its doors were not open to blacks, pursuant to state custom and practice which had the force of law.

Alabama College

The University of Montevallo had its origins in an 1893 legislative act which established "an industrial school for the education of white girls in Alabama." In 1895, Montevallo was chosen as the site for the new school. The name became "Alabama College" sometime thereafter. Men were first admitted to the College in 1956, when the legislature designated Alabama College as the state's college of liberal arts.

In 1969, the Board of Trustees changed the name to the University of Montevallo.

As of 1965, the school was still operated for whites only, under the established custom and policy of the State.

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[18] Alabama State University operated a Mobile Extension Center at which black high school graduates could receive their first two years of college education.

Florence, Jacksonville, Livingston and Troy State Teachers Colleges

Florence, Livingston, Jacksonville, and Troy State Teachers Colleges were the result of Peyton Finley's efforts to establish normal schools.

In December, 1871, the State Board of Education enacted a law establishing "a normal school at Florence, Alabama, for the education of white male teachers." The opening of the school was made possible by an 1873 deed to the state of the grounds and buildings of Florence Wesleyan University. The new normal school was appropriated ". . . at least five thousand dollars of the general educational fund of the State apportioned to the whites." In its 1873 amendment to the act establishing Florence Normal, the board indicated that the school would provide for the education of white female, as well as male teachers.

In 1883, the state legislature established a normal school for "white female teachers" at Livingston, Alabama, and another for white "male and female teachers" at Jacksonville, Alabama. Both schools were initially operated by a board of directors.

In 1887, the legislature "permanently established in the City of Troy, Pike County, . . . a school for the education of white male and female teachers. . . ." A board of directors for the "State Normal School at Troy" consisted of nine trustees and the state superintendent of education. The state board of education subsequently took control of the school, and operated it as one of the four "Class A Normal schools."

By the turn of the century, each of these normal schools, as well as Alabama State Normal School for Negroes, had been placed under the control of the Board

of Education. The four white normal schools were designated, "Class A Normal Schools." [19]

In 1920, the Board of Education reduced the curricula of the Class A Normal Schools to two-years. Nine years later, the four-year curriculum was restored at the schools, and they were named "teachers colleges."

Historically, these white teachers colleges received considerably larger state appropriations from the Board of Education than the black colleges. The presidents of the white teachers colleges were consistently paid higher salaries than the president of Alabama State. Under the 1927 School Code, for example, the white normal schools were each appropriated $40,000 annually; the "State Normal School for colored teachers located at Montgomery" was appropriated exactly one-half of that amount.

Florence State College did not admit black students until 1963, when Wendell W. Gunn was ordered admitted to the school by this Court. There is no credible evidence that any other black students were admitted to the school prior to 1967.

Not a single black had been admitted to the three other schools prior to the 1967 order in *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967).

The Board of Education had direct involvement in the day to day administration of the two black colleges under its control. In 1921, for example, the board limited the debt-incurring authority of the president of A&M to $50. As late as 1960, the Board of Education expelled black Alabama State students after they had participated in a sit-in. *Dixon v. Alabama State Board of Education*, 186 F. Supp. 945 (M.D. Ala. 1960); *rev'd*,

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[19] The "Class B Normal Schools" were apparently white also; but they generally offered education below the collegiate level.

294 F.2d 150 (5th Cir. 1961). In discussing Alabama State's lack of accreditation in 1963, Judge Johnson wrote:

> Thus, if there was a 'weakness' or graduate program 'insufficiently supported' by faculty and library or a 'very confused situation' in the general administration of the college, it was the responsibility of the State of Alabama, acting through its State Board of Education, to correct these matters instead of allowing these deficiencies to continue.

Franklin v. Parker, 223 F. Supp. 724 (M.D. Ala. 1963).

The Southern Association of Secondary Schools and Colleges did not admit black colleges to membership prior to 1956. In that year, Alabama State was given probationary accreditation for five years. In 1961, accreditation was denied to both Alabama State and A&M. All of the "Class A" schools were fully accredited. *Id.*, at 725, 726.

The Board of Education and the State of Alabama took various actions which had the effect of stymying the growth and development of both Alabama A&M and Alabama State. Instead of setting up a School of Veterinary Medicine for blacks at the black land-grant school (since Auburn's School of Veterinary Medicine was by statute "for whites"), Tuskegee Institute was chosen instead. Therefore the annual appropriation went to Tuskegee, rather than to A&M. For a number of years, the state superintendent of education contracted with Tuskegee Institute to provide to black students "courses in engineering, veterinary medicine, and graduate courses offered in home economics and vocational agriculture;" and under this contract alone Tuskegee received $300,000 annually during the fifties. Obviously, these courses should have been developed at Alabama A&M, and the funds should have gone to that school. Rather than set-

ting up a nursing school at Alabama State or A&M,[20] the state superintendent contracted with Tuskegee Institute to provide nursing education to blacks.

Until 1966, where black residents of Alabama desired to take a course or program offered by either the University of Alabama or Auburn, but unavailable at A&M, Alabama State, or Tuskegee,[21] the state Board of Education funded the difference between the tuition and expenses at the University or Auburn and that of the college or university of their choice.

As of 1965, blacks had never been appointed to the governing boards of any of the institutions of higher learning in the state or to the State Board of Education. Faculties and staffs were rigidly segregated. Alabama State was operated as the black counterpart to the University of Alabama; A&M was the black counterpart to Auburn. The black institutions were unequal, in every objective sense, to the white institutions of higher learning.

The conclusion is inescapable that as of July 2, 1965, the State of Alabama continued to operate a racially separate and unequal system of higher education.

II

Development In The Period 1965-1975

In the 1965-1975 decade, six developments within the system of higher education impacted on its ability to disestablish its racial duality. The three-judge court handed down its decision in *Lee v. Macon County*; the University of Alabama at Huntsville ("UAH"), Auburn

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[20] Presently, there are nursing schools at each of the successors to the "Class A" schools; neither Alabama State nor A&M has one.

[21] Tuskegee was considered only in those instances in which the superintendent had contracted with it for a particular course or program.

University at Montgomery ("AUM") and Troy State University at Montgomery ("TSUM") were established; Athens College became a part of the state system of higher education; and the Alabama Commission on Higher Education ("ACHE") was established.

On March 27, 1967, the three-judge panel in *Lee v. Macon* found that

> The State's trade schools, vocational schools and state colleges: continue to be operated on a segregated basis. The operation of these systems is the immediate responsibility of the State Board of Edcation.
>
> * * *
>
> There is no necessity for setting out the facts in detail concerning the operation of these state colleges since the evidence conclusively establishes—the defendants do not controvert it—that these schools have been and continue to be operated as if *Brown v. Board of Education* were inapplicable in these areas.
>
> * * *
>
> It is quite clear that the defendants have abrogated, and openly continue to abrogate, their affirmative duty to effectuate the principles of *Brown v. Board of Education, supra.* Although the facts as herein outlined speak eloquently for themselves, there is no more clear an indication of this than Superintendent Meadows' statement that he has done nothing to eliminate segregation in the public schools of Alabama.

267 F. Supp. at 474. The Court proceeded to order the Board of Education to admit blacks to the state colleges under its control, and to ". . . direct such . . . state colleges to recruit, hire, and assign teachers so as to desegregate faculty and to accomplish some faculty deseg-

regation in each such . . . state college by September, 1967." 267 F. Supp. at 484.

Reaction was swift. Six years earlier, Governor Patterson had repeatedly urged the state legislature to remove the white colleges from the control of the board of education, so that desegregation efforts would be frustrated.[22] At the session of the legislature following *Lee v. Macon*, the legislature wasted no time in enacting Governor Patterson's proposal into law. Motivated by racial considerations, the white colleges thus received separate boards of trustees at the hands of the legislature, while Alabama State and A&M remained under the control of the State Board of Education.

The University of Alabama started offering extension courses in the Huntsville area in the 1950's. The Army Ballistic Missile Agency was set up in Huntsville in 1956; and four years later, the Marshall Space Flight Center of the National Aeronautics and Space Administration ("NASA") was likewise established there. With the resulting influx of scientists, engineers, and other technicians in the Huntsville area, in the late fifties and

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[22] Governor John Patterson made the following statement to a Joint Session of the Alabama Legislature on May 2, 1961:

> I wish to again recommend the enactment of a law placing our State colleges—with the exception of the Negro colleges—under the control of separate boards of trustees if they are not already under such boards. I make this recommendation because I see the need for further decentralizating control of our colleges due to continued attacks by race agitators to integrate our schools. This decentralizing would make it more difficult for these agitators to attack more than one college at a time. I believe the Negro colleges should remain under the control of the State Board of Education. I also recommend the enactment of a law placing the State trade schools under separate boards of trustees for the same reasons. The members of the Boards of Trustees should be appointed by the Governor for fixed and staggered terms, and the Governor should serve as ex-officio chairman of the boards in every case.

early sixties, there was a demand for a graduate program in engineering and the sciences. A&M College was located in Huntsville, but it was never seriously considered as a source for these courses because it was a black school; and under the law and firmly established custom of the State of Alabama, white students could not attend it and white teachers could not teach there. The University's Huntsville Extension Center was the choice of the community, federal government officials and scientists; and as the community and federal government offiicals were well aware at the time, blacks could not attend the Extension Center.

As found earlier, Dave McGlathery became the first black to attend the Huntsville Extension Center in 1963. He was admitted only under a court order and the "military occupation" by federal troops of the "campus of the University of Alabama, which includes the campus at Huntsville," to enforce the order.

In 1963, UAH started offering degree programs at the master's level; and in the following year, undergraduate degree programs were offered. Doctoral programs in physics and engineering were first offered in 1971.

As of September, 1967, UAH offered programs in four divisions: engineering, general studies, natural sciences and mathematics, and graduate studies. The undergraduate degree programs consisted of: Bachelor of Arts in english, history, and mathematics; Bachelor of Science in physics and Bachelor of Science in engineering, with specializations in electronics, mechanics and systems. Master's degree graduate programs were offered as follows: Master of Science in physics; Master of Science in engineering. UAH offered no doctoral programs in 1967.

The UAH campus is in northwest Huntsville, adjacent to Research Park. Its 13 buildings were all constructed

since 1960, and they contain modern equipment and exemplify modern functional design. The UAH main campus consists of 337 acres; it has two modern buildings for medical education and patient health care in a separate, ten-acre medical campus.

Both UAH and A&M are within the city limits of Huntsville.

Prior to 1967, the University of Alabama operated an Extension Center in Montgomery. The Extension Center offered three years of college work, but it did not offer degree programs. Alabama State University was the only four-year, degree-granting, state-supported institution of higher learning in the county. In 1966, the all-white Montgomery Chamber of Commerce reactivated its dormant Education Committee in an effort to establish a four-year state-supported institution for whites in the Montgomery area.

The Chamber of Commerce first approached the University of Alabama; it declined the invitation. Auburn University was next approached, and it agreed to undertake the project. Governor Wallace and the local white elected officials all gave their wholehearted support for the project.

Auburn made no independent study or investigation concerning the need or feasibility of a branch in Montgomery; it basically took the position that while it would do nothing to promote or secure a branch in Montgomery, it would operate a branch there if the legislature made an appropriation for such a branch and assigned it to Auburn.

The Montgomery Chamber of Commerce never considered the utilization or expansion of Alabama State, although the school had existing programs in liberal arts, business and teaching education, and continuing education for adults. The reason is simple: at the time, the

Governor and the legislature would not have supported a racially mixed institution of higher learning in Montgomery.

At the very time that the Chamber negotiations with Auburn were being had, the Governor and the legislature were expressing their fury over the decision in *Lee v. Macon*, 267 F. Supp. 458 (M.D. Ala. 1967), which had, among other things, required the desegregation of the senior colleges under the control of the State Board of Education. In an effort to thwart the decision, the legislature removed the white colleges from the control of the state board and placed them under separate boards of trustees.

On the same day that Governor Wallace signed the bills creating separate boards of trustees for the white teachers' colleges, he signed a bill providing tuition grants to students who chose not to attend desegregated public schools; and he also signed the bill creating AUM and appropriating $5 million for its construction and operation.

Given the mood of the 1967 session of the legislature, it is apparent that it would not have considered the expansion of a black college so that it could serve white students.

AUM is located roughly five miles from ASU in Montgomery. According to the Auburn catalog, AUM ". . . has developed rapidly, especially since moving to a new 500 acre campus . . . in 1971."

Athens State College boasts that it is "both the oldest and the youngest institution of higher education in Alabama's state educational system." It was founded in 1822; and for more than a century, it was operated as a private college by the Methodist Church. In 1974, in the face of an insurmountable financial crisis, the United Methodist Church offered the college to the State of Alabama; and in 1975, over the objection of ACHE, the

school was accepted by the State Board of Education subject to the appropriation of operating funds by the legislature.

The legislature authorized Athens State to function as a senior college. It accepts transfers from the junior college community and technical colleges of the State, as well as transfers from the traditional four-year colleges and universities.

In 1981, the legislature placed Athens State and John C. Calhoun State Community College under a single administration. In the words of the State Superintendent of Education, the two schools are "being operated under one administration now as more or less a single college." The Court concludes that Calhoun Community and Athens College operate in tandem as a four-year college.

The main campus of Calhoun Community College is located in Decatur, Morgan County, approximately ten miles from the main campus of Athens State in Limestone County. Athens State's main campus is roughly twenty miles from the main campus of A&M; and Calhoun Community College's main campus is even closer to A&M.

Calhoun State Junior College was established post-*Brown* and its enrollment was limited to white students until the *Lee v. Macon* decision in 1967.

In 1965, Troy State University ("TSU") set up a branch in Montgomery. Under the policy of the State Board of Education, TSU's Montgomery ("TSUM") branch did not accept black students until forced to do so in *Lee v. Macon*. By 1976, 27% of TSUM's 304 full-time undergraduate students were blacks.

TSUM offers programs at the graduate and undergraduate level. It operates only evening and weekend classes. TSU operates a nursing program in Montgomery.

Since 1983, TSUM has been accredited independently of TSU.

The programs offered by TSUM largely and unnecessarily duplicate similar courses at ASU. In 1975, ACHE observed and recommended

> The situation in Montgomery is further complicated by the presence of an expanding program offered by Troy State University. . . . In Montgomery, except for the nursing program at St. Margaret's Hospital and the law enforcement program at the Montgomery Police Academy, Troy State University should restrict its offerings to Maxwell Air Force Base. Its programs should primarily serve the needs of the military. Non-military related civilian enrollment should be strictly limited. At neither the graduate nor undergraduate level should Troy State attempt to become a third general purpose institution in Montgomery serving the general civilian population.

TSU's Board of Trustees has obviously ignored the recommendation.

In recognition of the need for a coordinated system of higher education, the Alabama legislature in 1969 created the Alabama Commission on Higher Education ("ACHE"). ACHE consists of twelve members, ten of whom are appointed by the governor (one from each congressional district, the others at large); and one each by the lieutenant governor and the speaker of the house of representatives. Members serve for nine-year terms, and their appointments must be confirmed by the state senate. ACHE serves in an advisory capacity to the legislature and the governor ". . . in respect to all matters pertaining to state funds for the operation and allocation of funds for capital improvements of state supported institutions of higher education." § 16-5-2 *Code of Alabama of 1975*, as amended.

ACHE is broadly charged with the duty of continuously analyzing and evaluating the present and future needs of higher education in Alabama, establishing statewide long-range planning, coordinating programs in instruction, research and public service, and submitting to the governor and the legislature annually ". . . a single unified budget report containing budget recommendations for separate appropriations to each of the institutions" in the state system of higher education. § 16-5-5,6,8,9 *Code of Alabama of 1975*, as amended. The commission also has the duty of "classifying and prescribing the role and scope for each public institution of higher education in Alabama," and of recommending changes in the role and scope of respective institutions "as it deems necessary and which may be agreed to by the governing board" of the affected institution. § 16-5-10(6) *Code of Alabama of 1975*, as amended.

ACHE approval is required for the establishment of new programs or units of instruction. However, any institution may bypass ACHE and go directly to the legislature for approval of the new program or unit. While the University of Alabama and Auburn, because of their status as entities created by the 1901 Constitution,[23] are not required to obtain such approval, they often seek it. The commission has established procedures and criteria for the review of new programs and units, at both the undergraduate and graduate levels. There is a peer review of proposed new undergraduate programs or units. At the graduate level, proposed new programs are referred to an Advisory Council, consisting of the graduate deans of each of the institutions.

The affirmative vote of a majority of the Council is necessary for a recommendation that the program/unit be approved by the ACHE board.

The commission uses a formula process in recommending to the governor and the legislature a budget for each

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[23] *Opinion of the Justices*, 417 So.2d 946 (Ala. 1982).

of the institutions. The funding formula, first used in the early seventies, has several components. Faculty salaries, teaching load, class size, differences in the costs of instruction of various subjects, and differences in the level of instruction, are all considered in the formula. The formula is based on the historical cost data of the various institutions; and to the extent that funding inequities have existed in the past, they are necessarily perpetuated in the formula approach.

In its 1975 "Planning Document Number One", ACHE established three categories of public institutions of higher learning: (1) doctoral universities, with three subclasses, (2) master's-level state universities, and (3) two-year institutions. Under this classification scheme, the University of Alabama, Auburn, UAB, UAH, and the University of South Alabama are included in Category I. Alabama State, A&M, and the other state universities are placed in Category II; and the community colleges comprise Category III.

Under the funding formula, Category I institutions are entitled to enhanced funding ratios because of their status.

III.

The Land Grant Issue

Prior to the Civil War, the sale of public land was the chief instrument for national development policies. To encourage the development of higher education in the states, for example, Congress set aside public lands in varius [sic] states for the establishment of "seminaries of learning." The University of Alabama was established pursuant to such congressional action. The orientation and curricular [sic] of the original state universities tended to be classical.

In 1862, Congress enacted the Morrill Wade Act, which was designed to foster the development, in each state, of a

> college or colleges where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life.

Towards that end, each state was entitled to 30,000 acres of land or land scrip for each of its senators and representatives in Congress in 1860. Alabama was therefore entitled to 240,000 acres for a land-grant college or colleges. Each state was required to provide the buildings for the college(s).

The Civil War delayed the application of the Morrill-Wade Act to the southern states. During Reconstruction, Mississippi accepted the Morrill Act, and designated two land-grant colleges: the University of Mississippi for whites, and Alcorn University for blacks. Morrill Act funds were divided on a 40:60 basis between the two schools. In Kentucky, South Carolina and Virginia, the First Morrill funds were allocated between black and white land grant schools.

In Alabama, although blacks requested that a land grant college be set up for them, the Legislature designated Auburn as the only state land grant school. It was not open to blacks. Therefore, blacks did not receive any of the benefits of the First Morrill Act. The experience of Alabama blacks was not uncommon in the South; and between 1872 and 1890 northern Congressmen made repeated efforts to require the Southern states to equitably divide the land grant funds. They were unsuccessful in 1872, 1875, 1884, 1886, and 1880. Finally, in 1890, Senator Morrill was successful in persuading Congress to pass the Morrill-McComas Act, the Second Morrill Act. This act provided continuing federal

appropriations; and more importantly it contained an anti-discrimination provision:

> . . . no money shall be paid out under this act to any State . . . for the support of college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held in compliance with the provisions of this act if the funds received in such State . . . be equitably divided . . . .

The Act further provided that the ". . . institution for colored students shall be entitled to the benefits of this act and subject to its provisions, as much as it would have been if it had been included under the act of 1862. . . ." The Second Morrill Act is unquestionably a "supplement" to the First Morrill Act.

Meanwhile, in recognition of the need to apply science to the problems of agricultural production, Congress enacted the Hatch Act in 1887. This act made annual appropriations to the "college or colleges" established under the First Morrill Act, "or any of the supplements to the Act, in each state for the purpose of setting up agricultural experiment stations." The Hatch Act recites that ". . . in any State . . . in which two such colleges have been or may be so established the appropriation . . . made to such States . . . shall be equally divided between such colleges unless the legislature of such State . . . shall otherwise direct." When the Hatch Act was passed, the southern states (except the three mentioned) had designated only white institutions as land grant colleges. The Act clearly contemplated that black land grant colleges would be thereafter designated under the Morrill Act, and it gave the legislatures the authority to equally divide the agricultural experimentation funds to include the black institutions.

Auburn was promptly designated as the sole recepient [sic] of Hatch Act funds; the black land grant college in

this state has never been designated to receive, and for that reason has not received, any such funds. To be sure, the Alabama legislature did appropriate state funds for "colored agricultural experiment stations" in 1896 at Tuskegee Institute and the Alabama State Normal School for Negroes in Montgomery; but neither of these was ever designated to receive Hatch Act funds. Their state appropriations for agricultural research were short-lived. It was only the imminency of this lawsuit that prompted the legislature in 1981, for the very first time, to appropriate a rather meager amount for agricultural research *and* extension at Alabama A&M.

By the early 1960s, Auburn was receiving approximately $1,000,000 a year under the Hatch Act alone. By the early eighties, its Hatch Act funds had increased to over $3,000,000.

In 1883, the legislature established the Alabama Agriculture Experiment Station ("AAES") and placed it at Auburn. All of its scientists and administrators are located on the main campus at Auburn. The vast majority of the academic faculty of Auburn's School of Agricultural and Biological Sciences have joint appointments with the AAES. The head of each academic department in the School of Agriculture is also the head of the corresponding research unit within the AAES. There are 773 employees of AAES.

The work of AAES is divided into three geographical districts within the state. There are 21 substations of AAES; 14 of which are manned. The 1984 state appropriation to AAES was $8,700,000. Another $3,800,000 in federal funds was obtained under the Smith-Lever Act and similar federal legislation.

The Food and Agriculture Act of 1977 (P.L. 95-113), requires the director of the State Agricultural Experiment Station in each state where land grant institutions are located, together with the chief administrative offi-

cers for agricultural research at the other eligible institutions, to jointly develop, by mutual agreement, a comprehensive program of agricultural research for the state. AAES, A&M and Tuskegee Institute have jointly submitted the required comprehensive program to the Department of Agriculture since 1978; and they have been approved. AUX 6893, 6733, 6735. In these programs, AAES, A&M, and Tuskegee state that they, individually and as a group, "concur with and find no difficulty in the development and administration of a single comprehensive agricultural research program. . . ." There is therefore no basis for Auburn's assertion that statewide agricultural research cannot be shared between Auburn and A&M.

Auburn is also the site of the Alabama Engineering Experiment Station.

AAES owns 15,319 acres of land outside the Auburn campus. It has three experiment fields and forest units in four counties. The book value of these off-campus holdings is $3,406,418.

Auburn's state and federally supported agricultural research over the years have had a significant impact on the economic life of Alabama. As Auburn notes, "[t]hese research activities are also essential to the quality of the University's graduate programs." GX 96.

Lacking this state and federal support for agricultural research, A&M has not achieved a land grant status comparable to Auburn.

In 1914, Congress enacted the Smith-Lever Act, 7 U.S.C. § 341 *et seq.*

The statute recites, in pertinent part

> That in order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same,

> there may be inaugurated in connection with the college or colleges in each State now receiving, or which may hereafter receive, the benefits of the [First Morrill Act] and of the [Second Morrill Act] agricultural extension work which shall be carried on in cooperation with the United States Department of Agriculture: *Provided*, that in any State in which two or more such colleges have been or hereafter may be established the appropriations hereinafter made to such college or colleges as the legislature of such State may direct . . . .

Federal funds received under the Smith-Lever Act must be matched by state or local funds.

Governor Emmet O'Neal was notified by the Department of Agriculture, on May 14, 1914, of the need to designate ". . . the agricultural college or colleges to which the funds in this act are to go." Ten days later, the Governor met with the president of Auburn Polytechnic Institute and thereafter sent a letter to the Secretary of the Treasury designating Auburn as the sole Alabama institution to receive funds under the Smith-Lever Act. Apparently this designation was not widely known; and on June 16, President Buchanan of A&M formally applied to the Governor for a portion of the Smith-Lever funds, and simultaneously submitted a rather detailed plan and budget for the use of the funds by A&M. Upon receipt of the application, the Governor forwarded it to President Thach of Auburn for his ". . . opinion as to Buchanan's suggestions, and suggest[ed] form of reply."

By the time the Governor's correspondence reached President Thach, President Buchanan had already visited Thach twice concerning the matter. President Thach responded to the Governor on June 26:

> According to the Act and your certification, the work has already been established and organized in connection with the land grant college for the

> whites. . . . The funds available this year is only $10,000, and this has been appropriated by the Board of Trustees in an enlargement of the work already undertaken throughout the State. The plan includes assistance to the negro race, which will be administered by the staff of officers and specialists already employed. There is, on the part of the present organization, the keenest appreciation of the needs of the negro race, and as the funds develop every effort will be made to render all assistance possible.

There is no credible evidence of any plan of assistance for blacks by Auburn at the time.[24]

Along with various other institutes and schools, Tuskegee Normal and Industrial Institute also applied for a portion of the Smith Lever funds.[25] The Governor indicated to Dr. Washington of Tuskegee that at the time Auburn was designated, "[i]t was understood that a proper proportion of this fund should be used for the benefit of the colored farmers of the State." The Governor was ". . . of the opinion that your institute should receive a proper proportion of the fund and [I] have so written Dr. Thach, requesting him to take the matter up with you through correspondence." The Governor stated his unequivocal intention to ". . . approve any plan to which they [i.e., Dr. Thach and Dr. Washington] may agree in reference to a proper division of this fund."

Dr. Thach, with considerable indignation, wrote the Governor on July 28 and told him that as far as he (Thach) was concerned, the matter was "res adjudicata";

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[24] The Auburn plan, for example, included "work throughout the State" in various agricultural projects, and "cooperation with the Girls' Tech. Inst., Montevallo." Letter of July 28, 1914. Of course, the Girls' Technical Institute was all-white.

[25] The Smith-Lever Act by its terms restricted extension funds to land grant colleges receiving funds under the First and Second Morrill Acts.

that Auburn had been duly designated as the recipient of the funds, that its designation was consistent with the uniform practice of the Southern states to designate the white land grant school as the sole recipient of Smith-Lever funds, and that Auburn had already approved extension plans and let contracts for the extension projects.

He concluded by offering to confer with the Governor "in person concerning the matter." The conference was unnecessary; from that point on, the Governor took the position that he had no authority in the matter.

By resolution of January 15, 1915, the Legislature ratified the action of Governor O'Neal's designation of Auburn for Smith-Lever funds.

The Alabama Cooperative Extension Service ("AECS") was established at Auburn in 1914.

For purposes of service by AECS, the State has been divided into three geographical districts. There are joint appointments between ACES and the academic faculty at Auburn.

Federal law requires that a single, comprehensive program of extension be developed for each state. P.L. 95-113 (1977). A&M, Tuskegee Institute and Auburn have since entered into such a plan. The plan requires the institutions, among other things,

> "D. To take the necessary steps to effect a jont [sic] Extension program at the county, district, and state levels.
>
> * * *
>
> G. To develop organizational structures at the county, district and state levels that promote unified programs and discourage fragmentary of duplicative programs.

AUX 6699, p. 3.

The three integral components of any viable land grant university are instruction, research, and extension. The former director of the Alabama Cooperative Extension Service correctly analogized:

> It's like love and marriage, you can't have one without the other . . . . You can't have a land grant concept unless you have the three pieces, teaching, research and extension.

Auburn's facilities for agricultural instruction, research, and extension are vastly superior to those of A&M. Suffice it to say that the respective facilities are incomparable. These differences are principally the product of racial discrimination.

Until 1982, the legislature appropriated no money whatever to A&M for agricultural research and extension.

The total sum appropriated by the legislature to A&M for these purposes in 1982-83 was equal to the sum appropriated to Auburn for such purposes in 1947. In comparison to the $300,000 appropriated to A&M in 1982-83, the legislature appropriated over $19,000,000 to Auburn for extension, research, and services.

Completely aside from its discriminatory allocation of *all* federal Hatch Act and Smith-Lever funds to Auburn and the establishment of the AAES and ACES there, the state had a duty to appropriate sufficient *state funds* to A&M so that it could engage in substantial and meaningful agricultural research and extension work. The evidence compels a conclusion that the State of Alabama never intended A&M to function as a "separate but equal" land grant college; its purpose as a land grant school was merely to insure that Auburn would continue to receive the federal funds which enabled it become the preeminent white land grant institution in Alabama.

IV

Vestiges of the Dual System of Higher Education

Having found that the State of Alabama operated a dual system of higher education at least until 1967,[26] the Court now turns to the question of whether the dual system has since been disestablished. Considerations of the racial identifiability of the students, faculty, staff, and governing boards are probative. Likewise, the factors of program duplications between proximate institutions, degree offerings, facilities, and funding are important to a determination of whether the state system of higher education has achieved unitary status.

The University of Alabama System

The board of trustees of the University of Alabama is a largely self-perpetuating 12-member board, except for the two ex-officio members. However, each vacancy filled by the board is subject to confirmation by the state senate; and if the senate rejects a person elected to the board, then the senate fills the vacancy. Until 1982, no black had ever been elected to the board of trustees. In that year, two were elected and they are presently serving.

In June, 1969, the board of trustees established the University of Alabama System ("UAS") with three independent and autonomous campuses located respectively at Tuscaloosa ("UAT"), Birmingham, ("UAB") and Huntsville ("UAH"). Each campus has a president, appointed by the board of trustees. The presidents of the three campuses report to the Board through the Chancellor of UAS, who is the chief administrative officer of the system.

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[26] The Court is mindful that some of the defendant institutions admitted a few blacks pursuant to court orders prior to 1967. But the admission of one or two blacks does not signal the end of segregation.

At the time this lawsuit was initiated, 12.6% of the fulltime undergraduate students at UAT were blacks; only 4% of its graduate and professional students were blacks. For entering freshmen, admissions decisions are based in part on ACT scores. To the extent that the use of ACT scores by UAT adversely impacts on black students, the intensive recruitment of black undergraduate students compensates for its use. For example, there are now over 300 black undergraduate students enrolled in the College of Engineering, due in large part to the commendable efforts of the university to generate an interest among black high school students in engineering and in attending UAT. UAT professors have demonstrated a continuing concern for the success of such students after their matriculation.

Black students are comfortable in the UAT setting; and their involvement in student activities is accepted and encouraged. Black students have served as president of the Student Government Association, Homecoming Queen, and in a number of other leadership roles on campus.

In 1982, 22 out of the 826 fulltime faculty at UAT were blacks; only 3 out of the 132 parttime faculty members were blacks. The Dean of the School of Social Work is black; and blacks have occupied two endowed chairs at the University. There is an adjunct faculty exchange agreement between UAT and the predominately black Stillman College, also located in Tuscaloosa. Of the 28 new faculty members hired by the College of Arts and Sciences last year, two are black, another two are asian and one is hispanic. UAT has unsuccessfully recruited and extended offers of employment to other blacks. These efforts and offers were undertaken in good faith.

The programs and offerings of UAT do not unnecessarily duplicate programs and courses of A&M or ASU.

In 1983, blacks constituted 24% of the fulltime undergraduate enrollment at UAB; they accounted for

18% of the total enrollment there. There is no credible evidence of any impediments to the admission of blacks to UAB or to the participation by black students in the activities and affairs of the campus.

UAB's faculty statistics are somewhat bleak. Only 38 (2%) of some 1,325 persons on the fulltime faculty are black; and two of the 361 professors are black. However, more than half of the black faculty have attained tenured status; and another third is on the tenure track.

Blacks account for 11% of the professional non-faculty at UAB; and for 35% of the other non-science/maintenance jobs.[27] Blacks are well represented in service/maintenance job classification at UAB, accounting for 8.5 out of every 10 such employees.

The programs and courses of UAB do not unnecessarily duplicate those offered at the main campuses of A&M and ASU. To the extent that either or both of the latter schools continues to offer programs in Birmingham, they unnecessarily duplicate the programs of UAB.

Admission to the freshman class as a regular student at UAH is based on a high school grade point average of "C" and a minimum American College Testing Examination ("ACT") score of 16. Students who do not meet these requirements may be admitted under a special admissions programs.

In 1976, the first year for which such figures are disclosed in the record, 5% of the fulltime undergraduate students at UAH were blacks. Six years later, the percentage remained the same. In the 1984-85 freshman class at UAH, 7.2% of the students are blacks. UAH generally limits its recruiting to its primary service area: Madison, Marshall, Morgan, Jackson and Lime-

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[27] These include administrative, management, secretarial-clerical, technical-paraprofessional, and skilled craft jobs.

stone Counties—in which blacks account for 12% of the total population.

In 1982, there were two blacks on the 194 member fulltime faculty of UAH; and an equal number on the 132 member parttime faculty.

The graduate degree program in administrative science at UAH does not unnecessarily duplicate A&M's master of business administration program.

The undergraduate and graduate teacher education and certification programs offered at UAH unnecessarily duplicate similar and older programs offered at A&M. Since the institution of certain certification and graduate programs in education by UAH, white enrollment in similar courses offered at A&M has drastically declined.

Beginning in 1969, A&M offered an undergraduate degree program in computer science technology. In 1975, it obtained ACHE approval to offer a master of science degree in computer science technology. A year later, UAH obtained ACHE approval to offer a master of science in computer science. In 1980, UAH sought ACHE approval to offer a bachelor of science degree in computer science. The staff of ACHE recommended disapproval of the program, on the ground that its implementation ". . . would constitute an unwarranted duplication of the existing bachelor of science program in computer science technology offered by Alabama A&M University." UAH also requested approval of a doctoral program in computer science; and again, the staff recommended disapproval of the proposed program, "without prejudice pending the submission of a statewide desegregation plan", due to "the impact of the program in the Huntsville area." SX 18. The ACHE board of directors rejected these recommendations, and subsequently approved both programs. The existence of these unnecssarily duplicative courses at UAH had the effect of reducing white enrollment in A&M's master's program in

computer science from 90% in the mid-seventies to 19% at the present time.

As noted earlier, since 1967 UAH has offered a master's degree in physics. Contemporaneously in 1979, the chairman of the newly-created physics department at A&M and other A&M officials met with the president of UAH, the UAH physics department chairman, and other UAH officials and suggested that the two schools initiate a joint graduate program in physics. The UAH Officials rejected the proposal. Thereafter, in September 1979, A&M submitted to ACHE, for its approval, a proposed master of science degree program in applied physics. The proposed program would consist of two options: optics and materials science. At the urging of UAH and its staff, ACHE initially disapproved the program in July, 1980. The staff further recommended that A&M and UAH consider a joint master's program in applied physics. Several meetings were held; and in the meanwhile ACHE hired an outside consultant, Dr. Stanley Ballard of the University of Florida, to review A&M's proposed program.

Dr. Ballard evaluated the proposed program, and warmly endorsed the A&M proposed program.[28] In his

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[28] His report indicates, *inter alia*:

> The proposal is that an M.S. curriculum in applied physics be developed and initiated at Alabama A&M University. In my opinion, this would be a worthwhile project. Applied physics . . . is a rapidly growing field. Modern advances in optics, electronics, materials (surely including semiconductors) and sophisticated computer backup constitute a major force in modern-day research and development in industrial and government laboratories. An inclusive term that is widely used is "electro-optics." * * * The fields that A&M selected for first attention are excellent; modern optics (of course including lasers), and materials science (including applications to solar energy).
>
> * * *
>
> The outlines that were sent me showed a rather complete offering in optics, with some 12 courses listed.

summary, he concluded that "[t]he speciality [sic] courses in applied optics and materials science which have been planned by the A&M faculty members show understanding and originality." AMX 122. In further support of its proposed program, A&M obtained an endorsement from the Director of the Spectroscopy Laboratory at the Massachusetts Institute of Technology, who wrote:

> The proposed optics program does not appear to significantly overlap the Master's program in the 1980-81 catalog of the University of Alabama at Huntsville. The three or four background physics courses would be similar, but the extensive selection of specialty courses is not offered at UAH. As far as I can tell, a student could not obtain a specialty degree in optics based on the curriculum outlined in the UAH catalog.

Professor William B. White of the Pennsylvania State University's Materials Research Laboratory likewise strongly supported the A&M proposed program, and he also concluded that the proposed program of A&M and that offered by UAH "are by no means identical."

With these enforcements, the ACHE staff recommended approval of the A&M master's program in applied physics; and it was approved by the ACHE board on August 14, 1981.

ACHE has never approved either a program in applied physics or optics for UAH.

Since the approval of the A&M program in applied physics, the legislature has established a line-item (i.e., annual) appropriation of $600,000 to UAH for the operation of an optics center. It was with this annual state appropriation that UAH was able to set up a Center for Applied Optics, and to entice Dr. John Caulfield to become its director earlier this year. Dr. Caulfield has

brought with him to UAH a $9,000,000 "Star Wars" grant from the Department of Defense.

Auburn University

The Board of Trustees of Auburn University consists of the governor, the state superintendent of education, two members from the congressional district in which the institution is located, and one member from each other congressional district in the state. At the time this lawsuit was filed, no black person had ever served on the board; its first black member was appointed earlier this year. Auburn University and its predecessor institutions have always been operated by a board of trustees.

In 1980-81, blacks constituted 2.09% of the undergraduate enrollment, and 5.4% of the graduate students. For the 1983-84 school year, blacks constituted 2.4% of the undergraduates and 2.1% of the fulltime graduate enrollment. The Auburn main campus has the largest student body of any college or university in the state.

Auburn hired its first fulltime black faculty member in 1970. In the next thirteen years, it hired six more, so that by 1983-84, the seven blacks accounted for .6% of the total faculty of 1,033. Generally, Auburn does not actively recruit blacks for faculty positions. The reputation of Auburn University in racial matters leaves it at a distinct disadvantage, on a competitive basis, to attract qualified black faculty.

Except for athletes, Auburn admits as regular freshmen only those applicants whose ACT scores are at least 18 and who have an overall grade point average ("GPA") of "C".[29]

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[29] The Admissions Officer testified that if an applicant has an overall GPA of "B", he or she may be admitted with a minimum 16 ACT score.

The 18 ACT requirement, standing alone, effectively renders most black high school students ineligible (other than athletes), since the average ACT score of black students is only 12.7. Auburn is aware of the effect of this requirement.

The ACT requirement was first adopted by Auburn in 1962. A minimum 16 ACT was the requirement until 1968, when the minimum was raised by two points.

In 1977, Auburn's Director of Planning and Analysis completed a study entitled, "The Value of ACT and SAT Test Scores as Predictors Of First Year Performance At Auburn University." He concluded:

> Both the ACT and the SAT exhibit an acceptable level of predictive validity. Used alone, either is an equally good predictor of college performance. Of equal or greater importance, though, is past performance, as measured by high school grades. Obviously, a wide variety of high school grading practices exist, but the student who receives good grades in high school typically scores high in college. This predictive relationship is at least as strong as (and generally stronger than) those obtained when the ACT and SAT are used as predictors.

AUX 7468, p. 7.

The study also noted that although ". . . Auburn freshmen score very high nationally in the college aptitude tests, [they] rank rather low in first year college grade point average. *Id.*, p. 6.

Atheletes seeking admission to Auburn are not subjected to the 18 ACT requirement. In fact, there is no minimum ACT or SAT score for them; and within the past five years, Auburn has admitted athletes with scores as low as 6. AMX 149.

Black student participation in campus life and activities at Auburn is at a lower level than that of any of the other state-supported institutions of higher learning.

In *Strain v. Philpott*, 331 F. Supp. 836 (M.D. Ala. 1971), Auburn was found to have discriminated against black employees of ACES:

> The racial discrimination in this case has so permeated the employment practices and services distribution of the defendants that this Court finds it necessary to enter a detailed and specific decree which will not only prohibit discrimination but will also prescribe procedures designed to prevent discrimination in the future and to correct the effects of past discrimination.

Id. at 844.

The decree was entered in 1971. Twelve years later, the Court wrote: "The underlying problem in this case remains the absence of a more substantial number of blacks in managerial positions at the Alabama Cooperative Extension Service."

Auburn has a 1,871 acre campus, with 71 major buildings.

The evidence tends to support the widespread perception of blacks in Alabama that, except for the presence of black athletes and the changes mandated by federal laws and regulations, Auburn's racial attitudes have changed little since the fifties.

The relevant statistics at AUM stand in stark contrast to those of the main campus of Auburn. In 1972, 3% of the undergraduate enrollment at AUM was black. By 1982, 588 (16%) of the 3,570 undergradutes enrolled there were blacks. Only 4% (15 out of 375) of its graduate students in 1972 were blacks; ten years later, the number had increased to 29 (10%) blacks out of a total graduate enrollment of 268.

The regular admissions requirements at AUM are not as high as those of the main campus. A grade point

average of "C" and a minimum ACT of 16 are required for regular admissions. There are special admissions programs for students not meeting those requirements; and roughly 10% of the students are admitted under these special programs. The institution vigorously recruits black students. The student activities coordinator is black. Black students are actively involved in the campus life at AUM, one having served as president and three others as vice presidents of the student government association.

AUM hired its first fulltime black faculty members in 1971, when two were hired. By 1983, ten (5%) of the 179 fulltime faculty members were blacks, and 9% (12 out of 128) of the parttime faculty was black. In recent years, AUM has recruited blacks for faculty positions; indeed, it has attempted to recruit at Alabama State and Alabama A&M. Today, 13 blacks are among the 189 member fulltime faculty. A black has served as a department head; and five blacks hold tenured positions.

There is substantial needless duplication of the education and business programs offered by AUM and ASU. The presence of duplicated programs at AUM—a much newer and more attractive facility than ASU—has a negative impact on white enrollment at ASU.

Alabama State University

As noted earlier, Alabama State University ("ASU") was removed from the control of the State Board of Education and given a separate board of trustees in 1975.

The board of trustees of Alabama State consists of the governor, a member from each of the state's congressional districts, and two members appointed from the state at large. There is only one white on the board of trustees (other than the governor); and the governor

has generally appointed blacks (14 out of the 19 appointments) to the board.

As of 1982-83, there were 3,369 fulltime undergraduates at ASU; only 4 of whom were whites. In the 1972-73 school term, there were 50 whites among the 2,552 fulltime undergraduates. In an effort to recruit white students, ASU has offered a full scholarship to the valedictorian and salutorian of each Alabama high school. The program has been in effect since 1969; but it has been frustrated by white high school officials who respond by referring their top black students to ASU. There is no showing of involvement of white students in the campus life at ASU. There are only 3 whites in ASU's graduate programs.

In 1982-83, whites made up 19% (37 out of 193) of the fulltime faculty at ASU. In 1979-80, whites constituted 21% of the fulltime faculty. Nearly half (18 out of 41) of the parttime faculty is white.

In *Craig v. Alabama State University*, 451 F. Supp. 1207 (M.D. Ala. 1978), ASU was found to have engaged in a pattern of discrimination against whites in hiring and promotions.[30]

ASU still operates graduate programs of education in Birmingham, Mobile, Selma, and Uniontown. The programs in Birmingham and Mobile unnecessarily duplicate programs offered by UAB and USA, respectively.

Alabama A&M University

Since 1975, A&M has operated under an independent board of trustees. The board's membership includes the governor, two members from the congressional district

[30] Most of the findings in that case relate to actions taken, or not taken, by ASU during the time that it was operated by the state board of education. There is no evidence of discrimination against whites by ASU at anytime since it was given a separate board of trustees.

in which A&M is located, one member from each other congressional district in the State, and three members from the state-at-large. Two of the present members of the board are whites. Since the board was created in 1975, 12 blacks and 7 whites have been appointed to it.

During the 1982-83 school year, there were only 41 whites among the 2,977 fulltime undergraduates at A&M. There has been a gradual decrease in the white enrollment at the school over the last few years. In 1976-77, for example, whites accounted for 8% (292 out of a total of 3,375) of the undergraduate fulltime enrollment. In 1982-83, only 10% of the graduate enrollment was white; whereas only four years earlier (1978-79) 39% of the fulltime graduate enrollment was white. This decrease in white enrollment at A&M is directly attributable to the duplicative course and program offerings at UAH and Athens State-Calhoun Community Colleges.

There is substantial desegregation of A&M's faculty. As of 1983-84, 25% of the fulltime faculty was white. In the preceding four years, an average of 29% of the fulltime faculty was white.

Dsepite the lack of adequate agricultural facilities, A&M has completed beneficial agricultural research on triticale, remote sensing, and soybean breeding. Its significant research activities in remote sensing have continued despite attempts by state agencies to divert this research to Auburn.

A materials science research experiment of one of A&M's professors was selected for inclusion on a Space Lab 3 mission. His laboratory at A&M is an inadequate facility adjacent to the boiler room in the basement at A&M. The profesor, Dr. Lal, has been commended by the governor and the legislature; but he has not received any state funding for his research activities.

A&M owns 875 acres of land, including its campus.

The extent of renovations over the last 30 years at A&M adversely affects its ability to attract white students. Vehicular and pedestrian roadways and sidewalks are in serious need of repair; buildings are boarded up. The overhead power lines, bare ground, surface erosion and parking lots interspersed among the buildings detract from A&M's overall appearance. Substantial renovations and new construction are necessary to enhance A&M's attractiveness to white students.

A&M's attempts to enhance its program offerings are discussed at pp. 67-70, *supra*.

In 1981, A&M applied for approval of a doctoral program in nutrition science. The only reason for the disapproval of the program was that

> . . . the proposed program represented a request for a change in the role and scope of A&M University as outlined in *Planning Document Number One*. It was the Commissioner's opinion, any revision in role and scope for institutions should be addressed through statewide planning activities.

University of South Alabama

The USA board of trustees consists of the governor, the state superintendent of education, three members from Mobile County, three members from the state at large, one member from each of the nine state senatorial districts in the southern third of the state. The first and only black person was appointed to the board in 1984.

By 1971, however, blacks constituted 6% of the total student body. As of 1983, 10% of the total enrollment was black. 65% of USA's 1983-84 undergraduate enrollment of 2,317 students came from Mobile County; and blacks constitute 31% of the population of the county.

An applicant for regular undergraduate admission must have an ACT score of at least 16, or a combined

SAT score of at least 800. Students who do not meet this requirement may be admitted under a "limited enrollment program." Students may transfer to USA after completion of junior college, if they have maintained at least a "C" average. This transfer policy is one means by which greater numbers of black students may gain admission to USA, since the predominantely [sic] black Bishop State Junior College is now operating in the Mobile area.

In addition to its College of Arts and Sciences offering 29 Baccalaureate degree programs and seven master's programs, USA now has colleges of business and management, education, engineering, allied health, nursing and medicine.

USA hired its first black faculty member in 1968; in that year, it has over 120 white faculty members. As of 1983, there were 15 fulltime black faculty members and 500 whites. Five (11%) of the 44 parttime faculty members were blacks. At the undergraduate level, there was only one black professor, one black associate professor, 4 black assistant professors, and 3 black instructors.

USA has entered into a consent decree with the United States which provides for, among other things, the development and enhancement of an increased number of black faculty.

University of Montevallo

The board of trustees of the University of Montevallo consists of the governor, the state superintendent of education (ex officio), a member from each congressional district, and two members from the state at large. The sole black member of the board was appointed in 1983.

Today, blacks constitute 9.1% of the University of Montevallo's student body; and they vigorously participate in the life of the university. There are presently

nine blacks on the faculty of the university; over a dozen have been employed there over the past eight years.

The University of Montevallo has entered into a consent decree with the United States which provides for, among other things, the development and enhancement of an increased number of black faculty.

University of North Alabama

The board of trustees of the University of North Alabama consists of the governor (who is ex-officio president), the state superintendent of education, six members from the Seventh and Eighth Congressional Districts of Alabama and three members from the state at large. The trustees are appointed by the governor for twelve-year terms, and approved by the Senate. Since 1975, there has been a single black serving on the board of trustees.

Today, blacks constitute 8% of the UNA's total student population of 4,825. The school utilizes an "open door" admissions policy; and there is no evidence that the admissions policies of UNA actively discriminate against blacks or that blacks are adversely impacted by such policies. Black students are actively involved in the campus life.

Presently, there are 7 fulltime blacks on UNA's total faculty of 192. The first fulltime black faculty members were hired in 1969. There are no black administrators or professional staff members at UNA presently; although there have been as many as two such persons between the years 1976-1981.

The programs and courses of UNA do not unnecessarily duplicate those offered by A&M, due to the considerable distance between the schools.

Jacksonville State and Livingston Universities

The Jacksonville Normal School and Livingston Female Academy and Normal School became four-year teachers colleges for whites in 1929.

The board of trustees of Jacksonville State University consists of the governor, the state superintendent of education, two members from the congressional district in which the university is located, and one member from each of the other congressional districts in the state. The board of trustees of Livingston State University is similarly constituted, except that it has four additional members, appointed from the state-at-large. The first and only black to serve on the Livingston board was appointed in 1981; a similar appointment to Jacksonville's board was made in 1983.

As of 1982-83, Livingston had 1,458 students; 567 (38%) of whom are black. On its 57 member faculty, there are presently no blacks. Six black persons have been hired as faculty members at Livingston since 1974, but they have all left the school for reasons unrelated to race. Other blacks have been offered positions at Livingston, but they have declined employment there, again for reasons unrelated to race.

As of 1982-83 blacks accounted for 16% of the total student population at Jacksonville. Nine (3%) of the 267 faculty members there were blacks.

Both Livingston and Jacksonville have entered into consent decrees with the United States, under whose terms the schools are obligated to implement special programs to develop and enhance black faculty over the next five years.

The programs and courses of Livingston and Jacksonville do not unnecessarily duplicate the programs of Alabama State University and Alabama A&M University because of the distances involved.

Troy State University

The board of trustees of TSU consists of the governor, the state superintendent of education, two members from the congressional district in which the school is located, and one member from each of the other congressional districts in the state. No black has ever been appointed to TSU's board of directors.

Black enrollment at TSU's main campus has risen from 2% in 1972-74 to 19% in 1984-85. The admissions office actively and successfully recruits black students.

Unconditional undergraduate admission requires a minimum 16 ACT score and a "C" average. Conditional admission is available to applicants scoring less than 16 on the ACT but having at least a 2.3 ("C") grade point average in high school work. Without regard to ACT scores or grade point averages, TSU accepts transfers of junior college students who have maintained a "C" average for two quarters.

The programs and courses offered by TSU at its main campus and in Dothan, Alabama do not duplicate the program courses offered by Alabama State University.

The fulltime faculty of TSU's main campus consists of 5 blacks and 150 whites.

The programs and courses offered by TSUM largely and unnecessarily duplicate various programs and courses offered by ASU in Montgomery. At the undergraduate level, there are at least 15 unnecessarily duplicated programs; and an equal or greater number of duplicative courses are offered by TSUM at the graduate level.

Between 60-72% of TSUM's enrollment is white. In 1982-83, TSUM had an average of 549 fulltime students and an average of 1,502 parttime students. Its fulltime faculty consisted of one black and 25 whites.

Athens State

Admission requirements of Athens State are simple: a degree from a regionally accredited two year institution; a diploma from a technical college or institute; or the completion of 96 quarter hours of college credit with a 2.0 grade point average on a 4.0 scale.

As of the winter quarter of 1985 Athens State had a student enrollment of 1,148; 473 of whom were enrolled on a fulltime basis. Only 5% of its students live on campus. 1,045 of its students are white; and 78 (7%) are black. Four of its 43 faculty members are blacks.

Nearly two-thirds (63%) of Athens' current students are majoring in business administration (43%) or education (20%). SBX 256.

The college division of Calhoun Community College had 4,126 white and 422 black (8%) students in the 1984-85 school year. Over three-fourths (78%) of the college division's students reside in either Madison County (49%) or Morgan County. Sixteen percent of the population of those two counties is black. All of its students are commuters. The college division accounts for 61% of the students at Calhoun Community College. Its faculty consists of 120 members.

Black students at Athens State have been warmly received. They participate vigorously in the activities of the college. In 1980, a black student was elected president of the Student Government Association; and black students are well represented in the activities and life of the college.

ACHE has consistently opposed the state operation of Athens State, on the ground that its courses and programs needlessly duplicate existing programs at A&M and UAH. Athens State's undergraduate programs in education, humanities and sciences, science and engineer-

ing, and business administration needlessly duplicate some 39 courses offered at A&M.

Calhoun Community College offers evening extension courses at West Lawn Middle School and Huntsville High School—both located in the City of Huntsville. As of the fall of 1983, sixteen of those courses needlessly duplicated evening courses offered by A&M. In the preceding year, 25 such courses were needless duplications. The vast majority of the 1,700 students enrolled in these Huntsville extension courses are white.

Athens State also offers courses in Huntsville, housed at Redstone Arsenal. In the 1984-85 school year, 198 students were enrolled in these courses. The overwhelming majority of these students are white.

The State Board of Education consists of the governor (as president and ex-officio member), and eight members elected from each of the congressional districts of the state. Prior to 1969, the members of the board were appointed by the governor from the respective congressional districts. The Board of Education has "general control and supervision of the public schools," except those institutions of higher learning having boards of trustees. § 16-3-11, *Code of Alabama of 1975.* The Board of Education adopts the "rules and regulations governing the training and certification of teachers."

There has not been a black member of the Board of Education since Reconstruction.

As mentioned earlier, the board promulgates the standards and criteria for teacher education and certification programs at all of the state's institutions of higher learning. Without prior board approval of a teacher education program, it is not eligible for either accreditation by the regional accrediting agencies or state funding. The unnecessarily duplicative education and certification programs at UAH, Athens State, AUM, and TSUM have all been approved by the State Board.

For a while during the last five years, the Board of Education administered the Emergency Secondary Scholarship Program established by the legislature and under which prospective teachers are given two-year full scholarships to the college of their choice. During the two years that the state board administered the program (1982-83 and 1983-84), not a single black applicant was among the 36 who were awarded scholarships.

Without exception, no black has ever been appointed to the presidency or other chief administrative office in a traditionally white university or college in the state; no white has served in a similar position at Alabama State of [sic] A&M since 1915. With one or two exceptions, the deans of the various schools and colleges within the traditionally white universities are whites; similarly, the black universities generally have black deans.

Alabama's choice of resource allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and A&M to attract white students. In both cases, a new campus has been constructed in the very city in which the black university is located. Aside from the new campus, the new institution is in each case operated by either the University of Alabama or Auburn University—indubitably the two most prestigious schools in the state. The relative quality and quantity of the facilities and equipment of Alabama State and A&M leave them at a great disadvantage in competing against the proximate institutions for local white students.

Overall, both white students and traditionally white institutions are in a favorable financial position when compared with black students and traditionally black institutions in Alabama. For the period 1970-1983, Alabama State and A&M received less state and local appropriations per fulltime equivalent student than the University of Alabama at Tuscaloosa, Auburn, the Uni-

versity of Alabama at Huntsville, and Auburn University in Montgomery.

In 1982-83, the faculty at the University of Alabama and Auburn were paid, on the average, 28% more than faculty at Alabama State and A&M.

The funding formula and institutional classifications utilized by ACHE impede the disestablishment of the dual system of higher education, since they freeze in the effects of past funding and institutional discrimination against Alabama State and A&M.

The continued recognition of a special "constitutional status" for the University of Alabama and Auburn due to their inclusion in the 1901 Constitution, when Alabama State and Alabama A&M were omitted from the said Constitution for racial reasons,[31] is a vestige of the dual school system.

The student bodies of Auburn, AUM, Alabama State, A&M, UAH, and Athens College are still identifiable by race. The faculty of each institution in the system is identifiable by race, considering the total number of black and white faculty employed in the system and other evidence in the record.

Upon consideration of all the evidence, the Court concludes that the State has not dismantled the dual system of higher education.

V

Special Defenses

The State of Alabama, Auburn University, and various other defendants have asserted that there is no system of higher education in Alabama; that this case is barred by the holding in *ASTA v. College Authority*, 289 F.

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[31] See *Hunter v. Underwood*, —— U.S. ——, 105 St.Ct. 1916, 1920-21 (1985).

Supp. 784 (M.D. Ala. 1968); that ASU and A&M lack standing to assert cross-claims against the State of Alabama, and that the plaintiffs have failed to exhaust their administrative remedies under Title VI.

Most of the defendants deny that there is a system of higher education in Alabama. The Alabama legislature disagrees, for in the legislation creating ACHE it expressly refers to "the state *system* of public higher education . . ." § 16-5-10(2) *Code of Alabama of 1975.*

Members of the board of trustees of every defendant university are appointed by the governor of the state, with the sole exception of the University of Alabama. Every trustee, including those at the University of Alabama, must be confirmed by the Alabama state senate. The governor is the ex-officio chairman or president of the board of trustees of every state supported university —and as the evidence has shown clearly, that position is not merely ceremonial. With the exception of the traditionally black universities, the state superintendent of education is a member of the board of trustees of every state-supported university. Generally [32] on each board is at least one trustee appointed from each congressional district of the state.

Every university is required to submit a budget proposal to ACHE; and, in turn, ACHE is required to submit "a single, unified budget report" to the governor and the legislature.

Each new academic program or unit of instruction must be approved by ACHE; and it has the power to authorize and to regulate the off-campus offerings of the state universities.

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[32] Only the University of North Alabama and the University of South Alabama lack at least one trustee from each congressional district of the State.

As early as 1927, the State Board of Education was empowered to approve standards for teacher education programs at all of the state-supported colleges and universities, including those of the University of Alabama and Auburn. SBX 253-P.

Finally, in *ASTA*, the three-judge court judicially noticed that "Alabama has traditionally had a dual system of higher education"; and it found "as a fact that the dual system in higher education had not been fully dismantled." The defendants are estopped, therefore, from denying the existence of a system of higher education.

ASTA

In *ASTA* a three-judge court upheld the constitutionality of the legislation establishing AUM, both on its face and as applied.

Because ". . . no court dealing with desegregation of institutions in the higher education area has gone farther than ordering non-discriminatory admissions," and HEW ". . . has also largely limited its concern to admissions policies in administering Title VI of the 1964 Civil Rights Act," the Court stated that it, too, was "reluctant *at this time* to go much beyond preventing discriminatory admissions." 289 F. Supp. at 787 (emphasis added). The Court noted that since "[h]igher education is neither free nor compulsory", it is significantly different from elementary and secondary education. It concluded that

> as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied.

Id. at 789, 780.

The decision of the court was summarily affirmed by the United States Supreme Court. 393 U.S. 400 (1969).

As Judge Johnson, the author of the *ASTA* decision, has recently written:

> A summary affirmance of the Supreme Court has binding precedential effect. [Citing cases]. Yet because the court disposes of the case without explaining its reasons, the holding must be carefully limited. A summary affirmance by the Supreme Court represents approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court.

Hardwick v. Bowers, 760 F.2d 1202, 1207 (11th Cir. 1985). Moreover,

> . . . a summary disposition binds lower courts only until the Supreme Court indicates otherwise. [cites omitted] . . . Doctrinal developments need not take the form of an outright reversal of the earlier case. The Supreme Court may indicate its willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent.

Id. at 1208-1209.

This Court concludes that in affirming *ASTA*, the Supreme Court merely agreed that the statute which authorized the establishment of AUM is not unconstitutional.

Since *ASTA*, there have been doctrinal developments inconsistent with the reasoning of the panel decision. First, the same three-judge court subsequently held that new construction at the traditionally white junior colleges in Alabama could not be undertaken "until a [the traditionally black] Mobile State Junior College has been transformed into a fully desegregated two year institution . . .". *Lee v. Macon*, 317 F. Supp. 103 (M.D. Ala.

1970). Attendance at junior colleges, just as senior colleges, is "neither free nor compulsory."

More important are two post-*ASTA* higher education decisions. In *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971), a three-judge court enjoined the escalation of a predominately white two-year state-supported college to a four-year degree granting college, where the effect would have been to impede the desegregation of a traditionally black college in close proximity. The court there expressly declined to follow *ASTA*; and the Supreme Court summarily affirmed. *Board of Visitors v. Norris*, 404 U.S. 907 (1971).

More recently, in *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), the court implicitly rejected the *ASTA* reasoning when it affirmed a district court's decision to merge the predominately black Tennessee State University with the traditionally white University of Tennessee at Nashville. The Supreme Court denied certiorari in the case. 444 U.S. 886 (1979).

Further, the United States Office of Education, the agency charged with administration of Title VI now requires more than open admissions. As shown earlier, the *ASTA* reasoning was based in part on the fact that HEW, predecessor to the Office of Education, "limited its concern to admissions policies in administering Title VI." 280 F. Supp. at 787. Its precisely the newer standards of the Office of Education which precipitated this lawsuit.

Finally, the *ASTA* court indicated that much of its ". . . discussions were based on speculation. . . ." *Id.* at 789. The court assumed that ". . . as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education." *Id.*, at 790. Seventeen years later, the sad fact is that the problem

has not resolved itself. Freedom of choice in higher education, as in public school desegregation, was perhaps a necessary first step in the effort to dismantle the dual school system. But having failed to work in dismantling the dual system of higher education, the *ASTA* approach must now give way to a desegregation plan that promises realistically to work. *Geier, supra.*

The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggests that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept of Social Services*, 436 U.S. 658 (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

There is no jursidictional bar to the assertion of cross-claims by ASU and AUM against the other defendants.

With respect to the § 1983 claims in this case, there is certainly no requirement of exhaustion of remedies. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982). In *University of California Regents v. Bakke*, 438 U.S. 265, 283, 284 (1978), the Supreme Court expressly did ". . . not pass upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies;" and the Court's attention has not been directed to any subsequent case in which the Supreme Court has addressed the issue. In any event, the resort to

administrative remedies under Title VI (assuming the existence of such remedies) would prove futile or inadequate. To the extent that the defendants and the plaintiffs desired to reach a voluntary agreement in this case, they have had every opportunity to do so.

VI

By separate order, the defendants shall be required to develop and submit to the Court a plan for the dismantlement of the dual system of higher education in this state.

DONE this 7th day of December, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

Supreme Court, U.S.
FILED
JUN 30 1986
JOSEPH F. SPANIOL, JR
CLERK

NO. 85-1878 (2)

IN THE

Supreme Court Of The United States

October Term, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY; ALABAMA STATE BOARD OF EDUCATION; and GEORGE WALLACE, GOVERNOR OF ALABAMA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION SUBMITTED BY RESPONDENT, TROY STATE UNIVERSITY

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QUESTIONS PRESENTED

The respondent, Troy State University, adopts by reference the Questions Presented framed by respondents, The Board of Trustees for the University of Alabama and Auburn University.

PARTIES

The respondent, Troy State University, adopts by reference the listing of parties by respondents, The Board of Trustees for the University of Alabama and Auburn University.

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INFORMATION REQUIRED BY RULE 28.1

Troy State University, respondent herein, is a public corporation created pursuant to Alabama Code, 1975, §§ 16-56-1 through 16-56-15. As a public corporation, Troy State University has no subsidiaries and is the subsidiary of no other corporation.

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NO. 85-1878

IN THE

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October Term, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION SUBMITTED BY RESPONDENT, TROY STATE UNIVERSITY

STATEMENT OF THE CASE

The respondent, Troy State University, adopts by reference the Statement of the Case filed by respondents, The Board of Trustees for the University of Alabama and Auburn University.

ARGUMENT

The petitioners have failed to show that this case, in its present posture, involves issues of such extraordinary national significance that review before judgment in the court of appeals is justified. Sup.Ct. Rule 18. Neither have the petitioners shown any "special and important" reasons for the issuance of a writ of certiorari. Sup.Ct. Rule 17. The orders entered by the court of appeals are legally sound and are not in conflict with any decision of another federal court of appeals or any decision of this Court. The orders entered by the court of appeals simply do not present any issues warranting consideration by this Court at this stage of the proceedings.

I. This Case in Its Present Posture Does Not Present a National Emergency or Other Extraordinary Circumstance Justifying Review Before Judgment in the Court of Appeals.

While this Court has authority to issue a writ of certiorari prior to judgment in the court of appeals, 28 U.S.C. §§ 1254 (1), 2101 (e), this power has been exercised only in national emergencies or other extraordinary circumstances. Sup.Ct. Rule 18. Certiorari before judgment has been granted in cases of great constitutional significance, such as the constitutional issues raised by New Deal enactments having a pervasive effect upon the operation of the national economy. *Carter v. Carter Coal Company,* 298 U.S. 238 (1936) (constitutionality of Bituminous Coal Conservation Act of 1935); *Rickert Rice Mills v. Fontenot,* 297 U.S. 110 (1936) (constitutionality of Agricultural Adjustment Act of 1933, as amended); *Railroad Retirement Board v. Alton Rail Company,* 295 U.S. 330 (1935) (constitutionality of Railroad Retirement Act); *Norman v. Baltimore & O.R. Co.,* 294 U.S. 240 (1935) (validity of Joint Resolution of Congress respecting "gold clauses" in private contracts for payment of money). Aside from questions of great constitutional import, review on certiorari before judgment below has been limited to cases involving the scope of Executive authority,

United States v. Nixon, 418 U.S. 683 (1974) (directing the President to produce tape recordings and documents relating to conversations with aides and advisors for use in pending criminal prosecution), national emergencies, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) (constitutionality of Executive Order of President directing seizure of most of nation's steel mills), international jurisdictional disputes, *Wilson v. Girard,* 354 U.S. 524 (1957) (effect of administrative agreement pursuant to Treaty between United States and Japan), or wartime exigencies, *Ex parte Quirin,* 317 U.S. 1 (1942) (detention of German saboteurs for trial before Military Commission). On occasion, the Court has issued a writ prior to judgment below when identical or similar issues of constitutional import were pending before the Court in another case. *Taylor v. McElroy,* 360 U.S. 709 (1959).

In this case, none of the considerations which have historically been present upon issuance of a writ of certiorari before rendition of judgment in the court of appeals are presented. While important, this case in its present posture presents no issues arising from a national emergency and no issues of extraordinary constitutional significance requiring immediate review. There exists no imminent threat of harm to the petitioners and, within the knowledge of this respondent, there are no other cases pending in this Court presenting issues similar or identical to the substantive issues pending in this case in the court of appeals. In sum, this case simply does not present issues of the nature justifying certiorari before judgment below. This, in itself, is a sufficient basis for denial of the petition.

II. Jurisdiction is Proper in the Court of Appeals, Because the District Court Decision Contains Sufficient Indicia of Finality to Support an Appeal Under 28 U.S.C. § 1291.

Since the decision of the district court is final, determining everything except the details of implementation, the propriety of jurisdiction in the court of appeals is clear. The orders en-

tered in the court of appeals, which the petitioners seek to have reviewed on certiorari, are not, moreover, in conflict with decisions of this Court or with other courts of appeal. Sup.Ct. Rule 17.

The decision of the district court from which Troy State University and the other respondents have perfected appeals goes far beyond a mere finding of liability, as the petitioners would have it. The district court determined that the State of Alabama operated a dual system of higher education, that the dual system persists in certain respects, and that its vestiges have not been eliminated. Among a series of specific findings, the district court determined that at least fifteen programs offered by Troy State University at Montgomery unnecessarily duplicate program offerings at Alabama State University, with an equal or greater number of duplicative programs at the graduate level. The district court decision, in fact, determines everything, aside from the details of implementation of a remedial plan.

Moreover, by directing that four of the defendants, the State of Alabama, the Governor, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority, devise a plan for elimination of the vestiges which it found, and by restricting the involvement of Troy State University and the others to the privilege of comment on the plan, the district court has, in essence, terminated the participation of Troy State in the litigation as a matter of right. As with the other two institutional respondents, the district court, in assigning development of a plan to other defendants and restricting the rights of respondents to commentary, has ignored the statutory provisions which vest management of Troy State University in its Board of Trustees, Alabama Code, 1975, § 16-56-6, and has ignored decisions of this Court. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Brown v. Board of Education*, 394 U.S. 294 (1955). The submission of the plan is, in actuality, little more than an administrative or ministerial act which, even if minimal flexibility remains, clearly has sufficient indicia of finality to support an appeal pursuant to 28 U.S.C.

§ 1291. *See, Brown Shoe Co., Inc. v. United States,* 370 U.S. 294 (1962); *Morales v. Turman,* 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds,* 430 U.S. 322 (1977); *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. den.,* 419 U.S. 1108 (1975); *Thoms v. Heffernan,* 473 F.2d 478 (2nd Cir. 1973), *vacated on other grounds,* 418 U.S. 908 (1974).

III. Jurisdiction is Proper in the Court of Appeals, Because the District Court Decision Constitutes an Interlocutory and Mandatory Injunction Appealable Under 28 U.S.C. § 1292(a)(1).

Even were the district court decision not an appealable final order under 28 U.S.C. § 1291, the decision rises to the level of an interlocutory and mandatory injunction appealable under 28 U.S.C. § 1292(a)(1) by specifying that the remedial plan eliminate all vestiges of the prior dual system of higher education in Alabama, in conformity with the specific findings entered by the district court. *Board of Public Instruction v. Braxton,* 326 F.2d 616 (5th Cir. 1964); *see also, Morales v. Turman,* 535 F.2d 864, 867, n. 6 (5th Cir. 1976), *rev'd on other grounds,* 430 U.S. 322 (1977). This affords a further basis for appellate jurisdiction and raises no conflicts with decisions of this Court or other courts of appeals. *Compare, Spates v. Manson,* 619 F.2d 204, 208 (2nd Cir. 1980); *Frederick L. v. Thomas,* 557 F.2d 373, 380-81 (3rd Cir. 1977); *Hoots v. Commonwealth,* 587 F.2d 1340, 1349 (3rd Cir. 1978); *United States v. Western Electric,* 777 F.2d 23, 28 (D.C. Cir. 1985) (distinguishing *Morales* on the basis that, unlike this case, the order appealed from disposed of no issues in the case and failed to demonstrate "that the district court has made up its mind"). For these additional reasons, the orders entered by the court of appeals do not present special and important reasons for which a writ of certiorari should issue. Sup.Ct. Rule 17.

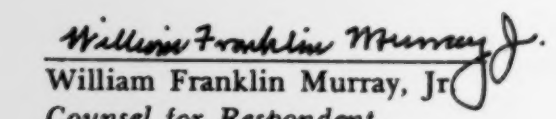
IV. The Entry of a Stay of District Court Proceedings is Proper.

The orders entered by the court of appeals staying further proceedings in the district court are clearly warranted. The decision of the district court threatens irreparable harm to Troy State University and the other respondents by requiring a major alteration of academic programs and policies with consequent impact on student and faculty recruitment, as well as other academic areas. The petitioners have failed even to advance the argument that they are likely to prevail on the merits. Moreover, neither the plaintiffs nor the public interest will be harmed by preservation of the *status quo* pending appeal. The only injury claimed by the petitioners is the simple fact that this is a "school desegregation case" in which, they assert, stays are never appropriate. Stays have, however, been upheld by this Court in school desegregation cases in which, like these proceedings, the balance of equities favored entry of a stay. *Corpus Christi School District v. Cisneros,* 404 U.S. 1211 (1971); *Columbus Board of Education v. Penick,* 439 U.S. 1348 (1978). The orders entered by the court of appeals staying further proceedings in the district court pending appeal simply do not constitute special and important reasons for which a writ of certiorari should issue. Sup.Ct. Rule 17.

CONCLUSION

This case, in its present posture, does not involve issues of such extraordinary national significance that immediate review is required before judgment in the court of appeals. Furthermore, the orders entered below are not in conflict with any decision of another federal court of appeals or any decision of this Court, and do not otherwise present any "special and important reason" for the issuance of a writ of certiorari. Accordingly, the petition should be denied.

Respectfully submitted,



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No. 85-1878

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; and BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY; *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; and BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA; *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENT BOARD OF TRUSTEES OF THE UNIVERISTY OF ALABAMA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a case being litigated primarily by or on behalf of two equitably funded state institutions of higher learning seeking enhancement of their budgets and programs through the vehicle of a lawsuit rather than through normal state administrative and legislative processes, lacks such "imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court," rather than after judgment in the Eleventh Circuit Court of Appeals, where the case is now pending?

2. Whether the Eleventh Circuit Court of Appeals properly granted a stay of the proceedings in the district court where the respondent universities (appellants below) in their notices of appeal and motions for a stay demonstrated each of the following: (a) a district court "final decision" or injunctive order sufficient to support an appeal under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1), (b) a likelihood of prevailing on the merits of their appeals, (c) a likelihood of irreparable damage to the respondent universities if the stay were denied, and (d) an advancement of the public interest and lack of harm to the other parties by the granting of the stay?

PARTIES

This respondent, the Board of Trustees of the University of Alabama, agrees with the statement concerning PARTIES on pages ii-iii of the petition except as follows:

1. The petitioners University Legal Defense Fund and National Alumni Normalite Association, support groups of petitioner Alabama A & M University, are not properly before this Court. These groups did not participate in the trial of the case in the district court, and were allowed only limited prospective intervention "for the purpose of providing the [trial court] with their views on any plan of desegregation which may be presented to the Court in the event that the plaintiffs and realigned plaintiffs prevail at trial." *See* Memorandum Opinion and Order Granting Limited Intervention (Nov. 28, 1984) *reprinted at* Appendix 1a-3a. Their status is identical to that of the University of Alabama Huntsville Foundation. The Foundation is a University of Alabama in Huntsville support group which was also granted limited intervention below, but was not allowed to participate at the trial. *See* Memorandum of Opinion Denying UAHF's Motion to Intervene As of Right and Granting Limited Permissive Intervention, and Order (Feb. 25, 1985) *reprinted at* Appendix 4a-9a.

2. In footnote 3 on page iii of the petition, the petitioners have misspelled the names of three of the trustees who sit on the Board of Trustees of the University of Alabama. The correct names of these three trustees are: Winton M. Blount, Frank H. Bromberg, Jr. and Sandral Hullett.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1878

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; and BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY; *et al.*,

Petitioners

v.

AUBURN UNIVERSITY; and BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA; *et al.*,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT BOARD OF TRUSTEES OF THE UNIVERISTY OF ALABAMA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Respondent Board of Trustees of the University of Alabama disagrees with petitioners' characterizations of this case and the orders and judgments below.

This case, as it has evolved to this stage, is not a "school desegregation case" in the traditional sense of the phrase, as claimed by the petitioners. It is true that the United States originally filed this action on July 11, 1983, seeking to eliminate all vestiges of an alleged dual system of higher education in the state. However, since

the district court allowed petitioners and former defendants Alabama A & M University and Alabama State University to realign themselves as plaintiffs in the case at an early stage, the suit has focused on their claimed institutional rights to enhancement, based on the alleged liability under Title VI and the Fourteenth Amendment of the other defendants described in the petition. There is no evidence in the record below that any of the institutional defendants have denied access to or discriminated against any student based on race within the last twenty years. Indeed, the evidence demonstrates that the University of Alabama System[1] enrolls more black students than either of the universities operated by the petitioners, and that there are significantly more black students attending predominantly white public universities in Alabama than collectively attend the two predominantly black universities operated by petitioners. *See* Alabama A & M Exhibits 203-234 summarized on table *reprinted at* Appendix at 10a.

Additionally, it is undisputed in the record that this respondent has affirmative action programs on each of its three campuses, is itself a biracial governing board, and that the number of minority faculty members on each of its campuses is within two standard deviations of what can be expected given the available numbers of minority persons nationwide with appropriate degrees in the respective fields in which its faculty are hired. *See* Testimony of Bernard Siskin at Appendix 11a-16a.

Additionally, this respondent, for the reasons set out below, disputes the assertion by petitioners that the opinion and order of the district court made on December 7,

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[1] The University of Alabama System, which is operated by this respondent, is composed of three campuses, The University of Alabama, located in Tuscaloosa, Alabama, frequently referred to as UA, the University of Alabama at Birmingham, frequently called UAB, and the University of Alabama in Huntsville, also known as UAH.

1985, entered on December 9, 1985, and subsequently modified on January 17, 1986, on which respondents' appeal to the circuit court of appeals is based, is "non-final." This issue is now being briefed by the respondents for consideration in the Eleventh Circuit Court of Appeals.

JURISDICTION

This respondent does not dispute the jurisdiction of this Court to act on the petition in this case.

STATUTES AND RULES INVOLVED

In addition to the statutes quoted by petitioners, the respondents submit that Rule 18 of this Court is particularly relevant to this petition:

> Rule 18. *Certiorari to a federal court of appeals before judgment.*
>
> A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellant practice and to require immediate settlement in this Court. See 28 U.S.C. § 2101(e); see also, *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952); *Wilson v. Girard*, 354 U.S. 524 (1957); *United States v. Nixon*, 418 U.S. 683 (1974).

STATEMENT OF THE CASE

One of the most cogent statements in the petition is its admission that "this is an unusual stage at which to seek review in this Court . . . ." Petition at 4. The unusualness and irregularity of this request by the peti-

tioners for Supreme Court review at this stage of the case is highlighted by the decision of the United States, not to join the petitioners in objecting to the stays issued by the court of appeals, and by its decision not to join the petitioners in filing this premature petition for writ of certiorari.

This suit was filed on July 11, 1983, by the United States based upon alleged violations of the named defendants, including the petitioners, of Title VI of the Civil Rights Act of 1964 [2] and the Fourteenth Amendment.

In the early 1970's, Judge John H. Pratt of the United States District Court for the District of Columbia ordered the Department of Health, Education and Welfare and its Office of Civil Rights, to begin Title VI compliance proceedings against ten states,[3] which became known as the *Adams* states.[4] Alabama was not among the *Adams* states.

However, in 1978, the Office of Civil Rights began a "compliance review" of Alabama public institutions of higher education, and on January 7, 1981, issued a "Letter of Findings" requesting that the State submit a plan to eliminate alleged remaining vestiges of segregation existing in the state senior institutions of higher education.[5] When a plan acceptable to the Department of

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[2] 42 U.S.C. §§ 2000d and 2000d-1 (1982).

[3] These ten states were: Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania and Virginia.

[4] *See Adams v. Richardson*, 356 F.Supp. 92 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C. Cir. 1973). *See also Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984).

[5] In the District Court this respondent raised as a defense the failure of the United States to follow the requirements of Title VI and the regulations issued thereunder before filing this suit. This defense is one of the issues being argued below. The respondents also dispute many of the conclusions in the "Letter of Findings".

Education was not submitted, it referred the matter to the Department of Justice and this case resulted.

Not until 1983, after this case was filed by the United States, did these petitioners surface with their "claims" asserted in this case.[6]

Petitioners have accurately described the extensive discovery preceding the July 1985 trial in the district court and its December 7, 1985, opinion and order, which is reprinted in the appendix to the petition. They also attempt to buttress their unusual petition by quoting a sentence from this respondent's 1292(b) motion describing the December 7 order as interlocutory. Petition at 7. The sentence quoted is taken out of context. Given (a) the unnecessary procedural complexities of the case caused by the realignment of two of the petitioners (and original defendants) as plaintiffs, (b) the bifurcation of the trial of the case, (c) the allowance of intervention as plaintiffs of the Knight petitioners, and (d) the findings and conclusions made by the district court which this respondent contends were clearly erroneous, this respondent concluded that prior to filing a notice of appeal, an attempt should be made to obtain from the district court permissive appellate review of the controlling questions of law in the case. Moreover, in that same motion for a certification by the district court which was filed on December 17, 1985, this respondent noted that "this order may be appealable as of right . . ." *See* Motion to Amend

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[6] Petitioner Alabama A & M University moved for realignment as a plaintiff on July 25, 1983, and petitioner Alabama State University filed a similar motion on August 5, 1983. Both motions were granted by the district court on September 26, 1983. The Knight petitioners, who were also parties to a previously filed lawsuit in the Middle District of Alabama, *Knight v. James*, 81-H-0052-N (M.D. Ala. filed June 15, 1981), and who have made claims in both suits limited to the Montgomery, Alabama, area where Alabama State University is located, filed a motion to intervene in the district court in this case on September 15, 1983, which was granted on April 18, 1984.

Interlocutory Order to Include Statement Prescribed by 28 U.S.C. § 1292(b) and To Allow an Immediate Appeal and Motion For a Stay" (Dec. 17, 1985) *reprinted at* Appendix 17a-24a.

After this and similar motions filed by other respondents were overruled, on February 5, 1986, both this respondent and respondent Auburn University filed notices of appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a). *See* Notices of Appeal *reprinted at* Appendix 25a-51a. Other respondents also filed notices of appeal.

Thereafter, on February 13, 1986, this respondent filed its Motion for a Stay with the Eleventh Circuit Court of Appeals. *See* Motion for a Stay of the District Court Memorandum of Opinion and Order Pending Appeal *reprinted without exhibits* (except for affidavit of John C. Wright) *at* Appendix 52a-71a. A similar motion was filed by respondent Auburn University on February 12.

Both motions for stays were granted by the Eleventh Circuit Court of Appeals on February 14, 1986, the day a state "plan" was due to be filed with the district court. The petitioners' motions to dissolve the stays have been overruled, and their motions to dismiss the appeals "carried with the case." *See* Petition at 8a.

On May 16, 1986, the certified record of 180 volumes along with 33 boxes of exhibits were sent by the district court clerk to the circuit court clerk, and on June 11, 1986, a tentative briefing schedule in the court of appeals was established. *See* Memorandum To All Counsel from Spencer D. Mercer, Clerk (June 11, 1986) *reprinted at* Appendix 72a-74a.

Meanwhile, on June 6, 1986, the Eleventh Circuit Court of Appeals handed down a decision in the State Board of Education appeal referred to in footnote 5 on page 9 of the petition. In this opinion, written by Judge Frank M. Johnson, Jr., it was held that petitioner Alabama State

University has no right to sue the State of Alabama under Title VI, the Fourteenth Amendment or Section 1983. See *United States v. Alabama*, No. 85-7582 (11th Cir. June 6, 1986) *reprinted at* Appendix 75a-89a. This holding strongly supports the position of the respondents that petitioners Alabama State University and Alabama A & M University were improperly realigned as plaintiffs in the district court in this case. Further, the special concurring opinion perceptively recognizes that this case has evolved into one primarily seeking massive revenue and program enhancement on behalf of two state universities which have no legal right to do so. *See* Appendix 89a.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because this case is pending in a federal court of appeals, before judgment, and is not of such imperative public importance as to justify deviation from normal appellate practice. Further, when this case's unique facts and procedural posture are considered, the granting of a discretionary stay by the circuit court of appeals does not conflict with decisions of this Court or other courts of appeals, because it is designed to prevent irreparable injury to the respondents pending appeal and does no harm to petitioners.

By filing this petition at this stage of the Eleventh Circuit appeal, petitioners are requesting this Court to decide an issue—appealability of the district court's December 7, 1985, Opinion and Order—that the Eleventh Circuit has expressly left open for decision in the future.[7]

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[7] In the Eleventh Circuit's March 20, 1986, orders, reprinted at page 8a of the petition, the court expressly declined to rule on the petitioners' motions raising the issue of appealability of the December 7, 1985, district court opinion and order, but instead "carried" them "with the case", thus reserving the issue for decision after the record is filed, and briefs on the merits of the case are submitted.

It is simply not true, as asserted in petitioner's footnote 6 on page 11 of the petition, that this issue has been decided by the appeals court by its issuance of the stay orders.[8]

The cases cited on page 10 of the petition[9] do not support the granting of the writ. Each of these cases involved both (a) Government appeals from district court rulings on motions to suppress in criminal cases, and (b) express rulings by the courts of appeals on the subject of jurisdiction to hear the appeals. Here, as indicated above, the Eleventh Circuit has not yet ruled on the question of appealability of the December 7, 1985, district court opinion and order.

Petitioners make no real argument that this case is of such imperative public importance as to justify deviation from normal appellate practice other than an unsupported claim that "allowing this appeal to be maintained and to be effectuated by staying all district court proceedings seriously injures the petitioners." Petition at 10.[10]

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[8] This assertion by the petitioners cannot withstand close scrutiny. It is ironic that the linchpin of their argument for granting the writ masks a request to the Court to do precisely that which they complain of below, namely to hear an appeal of an interlocutory ruling.

[9] *See Carroll v. United States*, 354 U.S. 394 (1957); *DiBella v. United States*, 369 U.S. 121 (1962).

[10] Petitioners also claim conflict between the orders granting the stay and national policy for swift pursuit of school desegregation. As mentioned above, when petitioners' claims for massive enhancement of facilities and programs are examined in light of the racial integration of the respondent institutions and the significant differences between elementary-secondary education and higher education are noted, it is clear that this suit bears little relation to the elementary-secondary school desegregation cases which have articulated national policy for speedy desegregation.

The record below, and the public appropriations acts of the Alabama Legislature, conclusively demonstrate that petitioners Alabama State University and Alabama A & M University have been equitably funded under the state appropriations process for many years, and are not being injured by the stay granted by the Court of Appeals. For example, petitioners Alabama A & M University and Alabama State University have for the past two years had higher percentage increases in appropriations from the Alabama Special Education Trust Fund than any of the other twelve senior institutions in Alabama. Similarly, an analysis of appropriations for the past five years places the petitioners near the top of the list of fourteen senior institutions. *See* Table of Analysis of Appropriations from the Alabama Special Education Trust Fund for 14 Senior Institutions *reprinted at* Appendix 90a.[11] Likewise, a comprehensive study of the facilities at a peer group of seven similar Alabama public institutions,[12] which was introduced as UAS Exhibit 1034 at the trial, demonstrates that petitioners Alabama A & M University and Alabama State University have been equitably treated over the past fifteen years in capital appropriations and higher education bond issues, and that no vestiges of any prior alleged racial discrimination in these areas were found to exist. See Excerpts from Facility Management Institute Report, Trial Court Exhibit UAS 1034, *reprinted at* Appendix 91a-107a.

It is especially noteworthy that there is no claim in the petition of any injury to *students* attending either

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[11] This analysis treats as a separate category appropriations for the Agricultural Experiment Stations and the Cooperative Extension Service administered by Auburn University.

[12] These institutions are: Alabama A & M University, Alabama State University, Auburn University at Montgomery, Jacksonville State University, Troy State University, the University of Alabama in Huntsville, and the University of North Alabama.

Alabama State University or Alabama A & M University resulting from the stay. This omission highlights the institutional nature of the claims of the petitioners.

Thus, when measured against the types of cases of imperative public importance which the court cites in Rule 18 as justifying deviation from normal appellate practice and meriting immediate consideration by this Court, it is clear the instant case falls far short of the mark.[13]

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[13] *See United States v. Bankers Trust Co.*, 294 U.S. 240 (1935) (certiorari granted because of similar or identical issues of importance already pending before the Court); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (certiorari granted because there were no serious or difficult questions of fact involved and the requisite importance of an early and final decision concerning the constitutionality of the Railroad Retirement Act was found); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (certiorari granted because it would have been impossible to recover taxes paid under the statute whose constitutionality was being challenged); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (certiorari granted in conjunction with several other suits challenging the constitutionality of the same act); *Ex parte Quirin*, 317 U.S. 1 (1942) (certiorari granted where several actions were brought involving violations of the law of war and Articles of War because of the importance of preserving civil liberty safeguards in time of war); *United States v. Mine Workers*, 330 U.S. 258 (1948) (certiorari granted because of public interest; the case involved a strike that resulted in mines furnishing the major part of the nation's bituminous coal being idled); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (certiorari granted to review Executive order calling for the seizure of the nation's steel mills in order to avoid a strike that would likely jeopardize the national defense because of the necessity of steel for weapons and war materials); *Wilson v. Girard*, 354 U.S. 524 (1957) (certiorari granted to review a denial of a writ of habeas corpus and issuance of declaratory and injunctive relief in an issue arising out of a security treaty between Japan and the United States); *United States v. Nixon*, 418 U.S. 683 (1974) (certiorari granted because of the public importance of the issues presented and the need for their prompt resolution; the issue arose from a subpoena directing the President to produce certain tape recordings and documents relating to conversations with aides and advisers).

I. The Issue of Whether The December 7, 1985, District Court Memorandum of Opinion and Order Will Support An Appeal Under Either 28 U.S.C. § 1291 or § 1292(a) Has Not Been Decided By The Court of Appeals and at This Stage There Can Be No Conflict With Any Decision of This Court or Other Courts of Appeals Which Can Be Used to Justify Granting the Writ.

As pointed out above, the Court of Appeals for the Eleventh Circuit has not yet ruled on petitioners' motions to dismiss the appeals which have been carried with the case. Thus, petitioners' argument on pages 11-17 of the petition that the court of appeals' actions conflict with decisions in this Court and in other courts of appeals concerning finality of judgments is neither pertinent nor correct.

However, as is more fully set out in respondent Auburn University's Notice of Appeal which is *reprinted at* Appendix 26a-51a, respondents assert that the December 7, 1985, Memorandum of Opinion and Order taken together constitute a "final decision" within the meaning of 28 U.S.C. § 1291 because their practical effect is to decide all of the significant issues in the present case. Alternatively, if the order is considered interlocutory, it is, with respect to the institutional respondents, a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1) because it specifies all of the critical elements to be addressed by the plan submitted by the state defendants, and prohibits the institutional respondents from any effective participation in preparing the plan which may adversely affect them.

II. The Court of Appeals' Stay Orders Were Justified Under the Particular Facts of This Case, and Do Not Conflict with Decisions of This Court or Other Courts of Appeals.

As is the case in many areas of the law, whether an appellate court should grant a stay of a judgment of a lower court pending an appeal is an intensely factual

question involving the careful balancing of various interests. Because of the nature of the judicial process, frequently decisions involving stays must be made quickly, to avoid irreparable harm to an aggrieved party and to preserve the status quo pending the appeal. As this Court has stated:

> No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.

Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4, 9-10 (1942).

Four factors have been articulated as relevant for determining when a stay should be issued: "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

This respondent, with a supporting affidavit from one of its campus presidents, has demonstrated to the court of appeals why a stay should be granted in this case, pending appeal, and has satisfied each of the above elements in its motion and supporting exhibits. *See* Motion For a Stay *reprinted at* Appendix 52a-71a. Thus, the Eleventh Circuit Court of Appeals clearly acted with-

in the scope of its authority and in accordance with Federal Rule of Appellate Procedure 8 when it granted the stays in this case.

Petitioners did not look far enough when they asserted on page 17 of the petition that they were "unaware of any authority in any court in support of an order staying proceedings at this stage in a school desegregation case." Justice Black, acting as Circuit Justice, did just that in *Corpus Christi School District v. Cisneros*, 404 U.S. 1211 (Black, Circuit Justice 1971), where a district judge's order in a school desegregation case was stayed because it was "apparent that this case is in a state of confusion and presents questions not heretofore passed on by the full Court, but which should be." 404 U.S. at 1211. The stay was granted pending action on the merits in the Fifth Circuit or action by the full Court. The instant case, although not a traditional school desegregation case for the reasons heretofore explained, certainly is in a "state of confusion" and presents questions never fully ruled upon in this Court.[14]

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[14] Although this Court stated shortly after *Brown v. Board of Education*, 347 U.S. 483 (1954) that it did not mean to imply "that decrees involving graduate study present the problems of elementary and secondary schools", *Florida ex rel. Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956), it has never fully discussed the differences between elementary and secondary school cases, and the unique problems of higher education desegregation. The closest this Court apparently has come to considering this issue is in its affirmance without opinion of the case of *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969). In the district court opinion written by Judge Frank Johnson, a three judge panel concluded that as long as an institution of higher education has nondiscriminatory admissions and hiring policies, and "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." 289 F. Supp. at 789-90. The court, noting the necessity for different legal stand-

Other more recent cases where stays have been granted in school desegregation proceedings include, *Pasadena City Board of Education v. Spangler*, 423 U.S. 1335 (Rehnquist, Circuit Justice 1975); *Columbus Board of Education v. Penick*, 439 U.S. 1348 (Rehnquist, Circuit Justice 1978), *vacated*, 443 U.S. 916 (1979); and *Metropolitan County Board of Education v. Kelley*, 453 U.S. 1306 (Stevens, Circuit Justice 1981).

Further, a "stay granted by a court of appeals is entitled to great deference from this Court because the court of appeals ordinarily has a greater familiarity with the facts and issues in a given case." *Garcia-Mir v. Smith*, 105 S.Ct. 948 (Rehnquist, Circuit Justice 1985). *See also Bonura v. CBS, Inc.*, 459 U.S. 1313 (White, Circuit Justice 1983). This has been particularly true in the area of civil rights law. Both the Fifth and Eleventh circuits have proved themselves to be sensitive to society's

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ards to be applied between elementary-secondary education and higher education, reasoned that as far as college admissions are concerned, unlike elementary and secondary education, higher education is neither free nor compulsory, and freedom to choose where one will attend college performs the important function of fitting the right school to the right student. In dissenting from the affirmance of this opinion by this Court, Justice Douglas recognized the import of this decision by saying: "The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on the one hand and colleges and universities on the other." 393 U.S. at 401. Likewise, the Fifth Circuit has stated: "Well established principles of public school desegregation have not been applied generally to institutions of higher learning in the same manner in which they have been applied to public schools below the college level." *Lee v. Macon County Board of Education*, 453 F.2d 524, 527 (5th Cir. 1971). The district court in this case refused to apply the *ASTA* standard. *See* Petition at 84a-87a. Likewise, the Eleventh Circuit opinion in the State Board of Education appeal in this case decides issues apparently never raised in this Court and increases the likelihood that the institutional petitioners herein will be realigned as defendants. *See United States v. Alabama*, No. 85-7582 (11th Cir. June 6, 1986) *reprinted at* Appendix 75a-89a.

needs in this field. In an article published just prior to the reorganization of the Fifth Circuit into the new Fifth and Eleventh Circuits, Dean Frank T. Read of Indiana University School of Law wrote that, "no court in this nation's history has had a more direct and continuing commitment to any human rights issue than has the Fifth Circuit, and those federal district judges who followed its lead." Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 Mercer L. Rev. 1149, 1165 (1981).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied, along with petitioners' requests to dissolve the stays entered by the Eleventh Circuit Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MEMORANDUM OPINION AND ORDER
GRANTING LIMITED INTERVENTION

Petitioners University Legal Defense Funds ("ULDF") and National Alumni Normalite Association ("NANA") seek intervention in this action so that they may ". . . give their input in any and all programs which may be devised to comply with the requests of the Complaint, for all such proposals would have a direct bearing on [them]."

ULDF is a non-profit corporation whose mission is, among other things,

> ". . . to secure financial compensation for Alabama A & M as a result of past years of discrimination funding, and to insure that Alabama A & M maintains its identity as a predominantly black institu-

tion, while at the same time making its resources available to all qualified persons without regard to race, color, or creed."

NANA is an organization of alumni of Alabama A & M University, ("A&M") with a mission similar to that of ULDF.

Petitioners are not entitled to intervene as of right, because they have neither established an unconditional statutory right of intervention, nor have they established that any of their legally cognizable rights are inadequately represented by the existing parties.

However, the petitioners' claims include factual and legal questions common to those raised by the plaintiff and the re-aligned plaintiffs. To the extent that those questions relate to alleged statutory and constitutional violations, unrestricted intervention will unduly delay the adjudication of the rights of the original parties, since a trial date has already been set. More importantly, as to these alleged violations, petitioners' interests are co-extensive with those of A&M, a party to this action; and those interests are being adequately protected by A&M.

If the plaintiff and the re-aligned plaintiffs prevail in this action, it appears to the Court, in the exercise of its discretion, that ULDF and NANA should be heard on any proposed plans of desegregation. Accordingly, their intervention in the action should be limited to that of presenting to the Court their views, by testimony or otherwise, on any proposed plan of desegregation which involves A&M, should this case reach that post-trial stage.

It is therefore ORDERED that the University Legal Defense Fund and the National Alumni Normalite Association be granted limited intervention in this cause, for the purpose of providing the Court with their views on any plan of desegregation which may be presented to the

Court in the event that the plaintiffs and the re-aligned plaintiffs prevail at trial.[1]

DONE this 28th day of November, 1984.

/s/ U. W. Clemon
United States District Judge
U. W. CLEMON

[1] Counsel for ULDF and NANA need not be served with papers hereinafter to be filed in this case, other than this order, unless and until the Court renders a decision in favor of plaintiff and re-aligned plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

ORDER

For the reasons stated in the accompanying Memorandum of Opinion, the Petition of the University of Alabama Huntsville Foundation To Intervene As of Right is DENIED; and limited permissive intervention is GRANTED.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
United States District Judge
U. W. CLEMON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

MEMORANDUM OF
OPINION DENYING UAHF'S MOTION TO
INTERVENE AS OF RIGHT AND GRANTING
LIMITED PERMISSIVE INTERVENTION

On January 9, 1985, petitioner University of Alabama Huntsville Foundation (UAHF) sought leave to intervene as of right in this action. It asserts that it has an interest in the University of Alabama at Huntsville (UAH), a predominately white institution of higher learning; that the disposition of the action may impair or impede its ability to protect that interest, and that its interests are not adequately represented by existing parties. For the reasons which follow, the Court finds and concludes that the petition is due to be denied.

UAHF is a private, nonprofit corporation. Its origins date back to 1962, when a "Research Sites Foundation, Inc." was incorporated for "[t]he sole purpose of . . .

serv[ing] in any and all possible ways the interest of the University of Alabama Research Institute at Huntsville, Alabama." The predecessor of UAH, the Alabama Research Institute at Huntsville, was established in the same year. In 1964, the corporation assumed its present name. Since 1980, the Board of Directors of UAHF has included the Chancellor of the University of Alabama System, the President of the University of Alabama in Huntsville, and the members of the Board of Trustees of the University of Alabama residing in the Congressional District in which the University of Alabama in Huntsville is located.

Over the years, UAHF has made substantial contributions to UAH, consistent with its mission. It has contributed, or obligated itself to contribute, nearly $750,000 to UAH. It owns virtually all of the land in Research Park, the center of high tech development in Huntsville; and it is the principal land owning corporation in the area providing reasonably priced commercial sites.

However, despite its money and its mission, UAHF has no legally cognizable property rights in UAH.[1]

UAH was admittedly created by the unilateral action of the Board of Trustees of the University of Alabama, a defendant in this action. It is and has always been under the direction and control of that Board of Trustees. UAHF does not decide or dictate the curricula or course or program offerings at UAH; it does not approve its budget; it does not hire or fire its president, faculty, or staff; it does not own the property on which UAH sits; it does nothing more than its articles of incorporation require: it provides *support* for UAH, and that support

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[1] The Court recognizes that interests in property are not essential to intervention as of right, *Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co.*, 386 U.S. 129 (1967), but "interests in property are the most elementary type of right that Rule 24(a) is designed to protect . . ." *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970).

is substantial. On the other hand, UAH has no control over UAHF. It lacks authority for example, to demand current income or past accumulation of income from UAHF, albeit that such income exists for the benefit of UAH.

UAHF's sole *raison d'etre* is to provide funds to benefit UAH. Its interests lie in the continued existence of UAH as an institution. None of the parties, including A & M, have suggested that UAH be dismantled. So long as UAH remains an institution, the disposition of this action will not, as a practical matter, impair or impede UAHF's mission. Contrary to its argument, UAHF will not be bound by a judgment on the liability aspects of this case. It will remain free to continue its vigorous support of UAH.

The law of this circuit is that

> Intervention of right must be supported by "direct, substantial, legally protectible interest in the proceeding. *Howse, supra,* 641 F.2d at 302-21, *Piambino v. Bailey,* 610 F.2d 1306, 1321 (5th Cir. 1980); *United States v. Perry County Board of Education,* 567 F.2d 277, 279 (5th Cir. 1978); *Diaz v. Southern Drilling Corp.,* 427 F.2d 1118, 1124 (5th Cir. 1970); *see Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed. 2d 580 (1971) ("significantly protectible interest"). *In essence, the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. See Piambino, supra,* 610 F.2d at 1321; *United States v. 936.71 Acres of Land,* 418 F.2d 551, 556 (5th Cir. 1969).

Athens Lumber Co., Inc. v. Federal Elections Com'n, 690 F.2d 1364, 1366 (11th Cir. 1982) (emphasis added). In no wise can UAHF be said to be a real party in interest in these proceedings.

UAHF has been aware of the pendency of this action since it was initially filed. At least one of the members of its Board of Directors is already a defendant in this case by virtue of his or her membership on the Board of Trustees of the University of Alabama and residence in the Congressional district in which UAH is located. In November, 1984, realigned plaintiff Alabama A & M University ("A&M"), the century-old predominately black institution of higher learning also located in Huntsville, filed a statement of its position. In that statement, A & M set forth its contentions concerning liability and relief. Alarmed at the relief requested by A & M insofar as the granting of such relief would affect existing and planned programs at UAH, UAHF filed this intervention petition on January 9, 1985. It should have been aware, from the outset of this litigation, that if liability were established, possible relief might affect existing and planned UAH programs and course offerings.

As of the date on which UAHF initially filed its intervention papers, the file in this case consisted of four volumes of pleadings and 35 volumes of discovery. Numerous depositions had been completed; others had been noticed. A pretrial conference had already been held; the principal pretrial conference was only three weeks away.

Counsel for the parties were, at that time and they remain to this date, consumed in their preparations for trial, for they were informed last fall that the case would be tried not later than the summer of 1985.

Upon consideration of the factors enumerated in *Stallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977), the Court finds that the intervention petition is untimely.

On the issues of whether the State of Alabama and its agents, agencies, and institutions have ever operated a dual system of higher education in Huntsville, Alabama; and, if so, whether that system and its vestiges have been eliminated, such interests as UAHF may possess are ade-

quately represented by the Board of Trustees of the University of Alabama. Indeed, those issues are vigorously being litigated by counsel; for the said Board of Trustees, as they properly should be, for the decisions and actions under challenge here are not those of UAHF; rather, they are decisions and actions of the University of Alabama Board of Trustees and the other named defendants.

UAHF is not liable for any of these decisions and actions; its incentive to litigate is not nearly as pressing as that of the Board of Trustees of the University of Alabama.

For all of these reasons, UAHF is not entitled to intervene as of right.

UAHF also seeks permissive intervention. For the reasons set out in the earlier part of this opinion, the Court finds and concludes that unlimited permissive intervention will unduly delay the adjudication of the rights of the original parties to these proceedings. Accordingly, UAHF will be granted a limited intervention—on the same terms and conditions as those previously imposed on putative interventors University Legal Defense Fund and the National Alumni Normalite Association.

By separate order, the petition to intervene as of right will be denied.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
United States District Judge
U. W. CLEMON

TRIAL EX. NO.	SCHOOL	UNDERGRAD - FULL			GRADUA
		Blk	Whi	Tot.	Blk
A&M 205	A&M **	2527	22	2953	98
A&M 208	AU *	467	14776	15426	30
A&M 209	AUM *	613	2804	3459	25
A&M 206	ASU **	3037	4	3102	99
A&M 210	JSU *	774	3473	4386	9
A&M 211	LU *	419	717	1145	11
A&M 213	TSU *	672	2668	3398	13
A&M 216	TSUM*	95	164	269	40
A&M 218	UA *	1179	9616	11102	52
A&M 219	UAB *	1325	4000	5449	53
A&M 234	UAH *	172	2372	2643	7
A&M 212	UM *	199	1769	2037	1
A&M 220	UNA *	337	3474	3844	-
A&M 203	USA *	630	4732	5851	23

UNDERGRADUATE
(Full-time)
Blacks at TBI's - 5,564 = 44.71%
Blacks at TWI's - 6,882 = 55.29%
Total Blacks - 12,446

(Part-time)
Blacks at TBI's - 486 = 20.95%
Blacks at TWI's - 1,834 = 79.05%
Total Blacks - 2,320

HEGIS 1984 FALL ENROLLMENT

E - FULL		UNDERGRAD - PART			GRADUATE - PART			TOTAL HEADCOUNT		
hi	Tot.	Blk	Whi	Tot.	Blk	Whi	Tot.	Blk	Whi	Tot
26	376	217	16	253	197	174	463	3089	249	4109
499	658	28	1071	1112	37	801	972	586	17810	18888
128	157	84	697	873	35	248	286	827	4195	5084
3	105	269	3	277	64	3	67	3694	17	3786
59	91	226	1136	1418	49	442	507	1070	5231	6564
34	45	48	71	119	38	120	158	523	968	1500
61	76	123	461	607	49	156	206	868	3392	4344
142	198	272	979	1296	74	155	235	502	1516	2096
842	1058	49	1399	1515	86	1287	1423	1392	13642	15626
773	915	574	2863	3484	81	817	914	2417	10757	13517
161	250	96	1768	1904	16	492	543	319	5264	5863
42	44	11	221	233	20	211	235	257	2446	2782
14	18	65	556	628	15	437	454	433	4714	5197
283	353	258	1771	2100	48	525	587	977	7731	9342

GRADUATE

(Full-time)

Blacks at TBI's - 197 = 42.73%
Blacks at TWI's - 264 = 57.27%
Total Blacks 461

(Part-time)

Blacks at TBI's - 261 = 32.26%
Blacks at TWI's 548 = 67.74%
Total Blacks 809

*ALL SCHOOLS EXCEPT TBI'S

**TBI

Part of Testimony of Dr. Bernard Siskin

August 1, 1985

* * * *

[7461] A. When looking at the faculty or any employment process, and one wants to develop a bench mark for the institution, there are standard statistical procedures which one does, which is to go out and define what is a relevant labor market and determine, given that relevant labor market, what proportion of persons in that labor market have the requisite skills to be hired, to be considered for being hired; and then under the assumption that everybody in the pool has equal probability of being interested in the position, applying for the position and being hired, whether they are black or white, one can get an expected percent black for the school. And that you would expect to differ by institutions because of clearly two obvious factors, one being different degree requirements. There is a different pool for Ph.D. faculty than [7462] there is for non Ph.D. faculty, and there's a different racial mix in the labor market of those containing two Ph.D.s which total—

MR. WHATLEY: I object to—

MR. WATKINS: Object to this line. This is outside his area of expertise. He's not an expert on labor availability of the pool. He can describe a method, a statistical method and whether that method is acceptable for measuring, but he's not an expert on labor pools and hasn't been offered as an expert on labor pools.

MR. CRENSHAW: Your Honor, we think is he and we thought he was offered in that regard.

MR. POWELL: I thought he was too, Your Honor. I'll be glad to—if there's any question about it, he's eminently qualified in labor employment discrimination.

THE COURT: Objection is overruled.

Q. (BY MR. POWELL:) Go ahead, Dr. Siskin.

A. Secondly, that there is a vast—as I was saying, for instance, the Ph.D. market overall would be a roughly

around three point six to four percent, somewhere in that range, [7463] black. The master's market is much higher and the bachelor's level is much higher, and moreover that's been changing over time, the percent black, percent minority in the Ph.D. level has been increasing over time.

You would also see major differences in percent black among Ph.D.s by field. They tend to be very small percentages in engineering, larger percentages in some of the humanities and social sciences. So you see vast differences by field, and these are the type things that will have to be adjusted for to come up with a standard to judge a faculty to determine whether or not it is underutilized.

Q. Did you do such an analysis or test for the University of Alabama, University of Alabama in Birmingham and University of Alabama in Huntsville?

A. Yes, I did.

Q. How and with what results?

A. What I did here was a bench mark analysis. It's different from what I would do say if I were doing a hiring analysis. Pools would be different. Okay. Because hiring, you would be drawing from a more recent pool and a [7464] different type of pool than when you're doing a bench mark.

For a bench mark study, what I did was first define the labor market. The labor market for all of these institutions, my understanding, is a national recruiter—

* * * *

[7465] Q. (BY MR. POWELL:) Would you continue, Dr. Dentler—I mean, Dr. Siskin, if you remember where you were?

[7466] A. Yes. The pools I used were national recruiting pool for faculty. What I did was I asked the universities to give me a list of their faculty by department and by degree and by race, but I was only real interested in the total for the race.

I then used the following data sources to compare what should be. For departments where there were predominantly Ph.D. degree holders, that is, where you might

have a department which had ten Ph.D.s and one non-Ph.D., I assumed that the one non-Ph.D. in that circumstance was probably an APD type instructor and the appropriate pool for that person would really be the Ph.D. pool.

I've compared those against the tabulated Ph.D.s granted by subspecialty area, matching the specialty area degree with the granted degree, data which is published by the National Center for Educational statistics compiled by the National Resource Council and published in one composite document by the University of Colorado, Department of Human Resources, affirmative action.

What that gives you is the percent [7467] black in specific fields of degree holders, two periods, '73 to '82 in most cases, and in certain cases '77 to '82. The distinction is essentially one that the earlier data was not always broken down in the same detail as the later data. For certain specialties, you can't get the earlier data.

In terms of its impact on the analysis, it shouldn't have any impact of anything, it should be conservative to the university in the sense that the percent black from '77 to '83 should be higher if you had the earlier period of data.

For those cases where the terminal degree was not a Ph.D., such as library science, I got from the Scientific Manpower Commission data percents offered in master's degrees and used that as the data.

For departments where there was a mix, and it wasn't clear that the Ph.D. was a necessary full requirement, for instance, a department which had eight Ph.D.s and five master's, non-Ph.D.s, I used the weighted average of the pools between the Ph.D. pool for the eight and the master's pool for the five.

[7468] For medical faculty, I used the—there are no degree specials in medicines, so what I was able to get was data from the Scientific Manpower Commission listing the racial mix of faculty in medical schools in the whole United States and used that as the bench mark figure, and that's by subspecialty area.

If you do that, I found the following: For the University of Alabama, the data which I was given—and I restricted myself to full-time permanent faculty. I excluded permanent part-time faculty that I was given, the reason being permanent part-time faculty typically is not drawn from a national pool, they tend to be local people with other jobs and, therefore, it's not an appropriate pool to use for those. And I eliminated temporary appointments because that would again not be an appropriate pool I think in terms of comparing the numbers.

For the University of Alabama, I found that they had reported sixteen black faculty, permanent full-time faculty.

* * * *

[7470] Q. (BY MR. POWELL:) Would you go ahead and give your numbers, Doctor?

A. What I found was, at the University of Alabama, based upon the pools, if you randomly selected from the labor markets, assuming that blacks and whites in the labor market had equal probability of applying and equal chances of being selected, you would have expected twenty-three point six black faculty on the campus of the University of Alabama. There are sixteen. That gives you a shortfall of roughly seven and a half people and that represents one point five nine standard [7471] deviations from the norm.

For the University—

Q. Excuse me, did you say how many faculty, the total faculty?

A. Total faculty was seven hundred fifty-five faculty.

Q. Okay.

A. Now, I did one other calculation from this. One of the problems—and the only department that I had problem with in terms of availability in terms of interpretation was the nursing, and that was common, it is not clear to me from my experiences, and from discussions here, to recruit nurses, even in the nursing schools generally, from the national pool. It tends to be much more

local pool. You cannot get data on a local level for nursing pool because data doesn't exist as of yet with degree, related to degree. Eventually the census will put it out, but had not yet at that time.

THE COURT: The Labor Department doesn't report it?

A. They report nurses, but they don't report nurses with degrees and nurses with master's degrees. Therefore, almost all the [7472] faculty had master's degrees in nursing and it's clearly a different pool. On the national level, you can get figures for Ph.D.s in nursing, master's in nursing, and bachelor's in nursing, and nurses without degrees, four-year degrees. You can't get it yet on a local level.

What I did simply was I eliminated the nursing school and recalculated the numbers to see what impact that would have.

At UAH, if you do that—I mean, University of Alabama, the sixteen faculty falls to fourteen because two of the black faculty are nurses. The expected falls to twenty-two point one. The shortfall goes up slightly to eight. And the standard deviation goes to one point seven five.

At UAB, what I found was thirty-two faculty of black out of one thousand three hundred thirty-six that were reported to me. You would expect thirty-four point one to be black. Shortfall of only two faculty. That represents zero point three six standard deviations.

If you move—

Q. And if you do it without nurses at [7473] UAB?

A. It goes down to twenty-two black faculty. Ten of the black faculty are in the nursing school. Expected falls to twenty-six point seven. Have a shortfall of roughly four—roughly five. That represents zero point nine two standard deviations.

Q. And the figures at UAH?

A. UAH, there are only two black faculty on UAH campus out of two hundred seven. However, the next

expected is only four point eight. That's the result of a high tech department mix. Perhaps relatively few blacks currently in the engineering profession with doctorates.

Q. What was the standard?

A. Standard deviation of one point two nine.

Q. And at UAH without nursing?

A. Remain two blacks. They have no black nurses. The expected falls to three point five, and the units of standard deviation dropped to zero point eight one.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Dec. 17, 1985]

MOTION TO AMEND INTERLOCUTORY ORDER TO INCLUDE STATEMENT PRESCRIBED BY 28 U.S.C. § 1292(b) TO ALLOW AN IMMEDIATE APPEAL AND MOTION FOR A STAY

On December 7, 1985, this Court filed, and on December 9, 1985, this Court entered, in the above action an order (accompanied by a memorandum of opinion) from which the Board of Trustees of The University of Alabama, a defendant in this action, seeks permission to take an immediate appeal under the provisions of § 1292(b), Title 28, *United States Code.* The above-described order does not contain the statement that, under such code section, must be included before an appeal from a non-injunctive interlocutory order may be taken. Therefore, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, the defendant Board of Trustees of The University of Alabama respectfully moves the Court to amend such order to include the following statement as a final paragraph thereof:

"In the opinion of the Court this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In support of this motion, the defendant Board of Trustees of The University of Alabama shows the following:

1. The order of the Court dated December 7, 1985, involves controlling questions of law. In the order the Court has found liability of this defendant based on claimed violations of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment of the United States Constitution, and has required that a plan to remedy these violations be presented utilizing the United States Office of Education's "Revised Criteria" which have not heretofore been judicially approved or properly adopted as rules or regulations under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* In so ordering, the Court has used legal standards different from those previously applied in higher education desegregation cases of the Eleventh and Fifth Circuits and apparently in the United States Supreme Court. If such standards were applied in this case instead of the legal criteria enunciated by this Court in its Memorandum of Opinion and Order there should be a finding of no liability of this defendant. Assuming, arguendo, liability were found under governing principles previously applied in the higher education cases decided in, or applicable to, the Eleventh Circuit, such holding would require a significantly less expensive and more educationally sound remedy than that mandated by the "Revised Criteria".

2. A substantial ground for difference of opinion as to such order exists inasmuch as:

A. This Court has clearly refused, in the instant order and opinion (pp. 93-97), for reasons stated therein, to

apply, in judging whether this defendant is liable under Title VI and the Fourteenth Amendment, the holding in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968) *a'ffd*, 393 U.S. 400, 89 S.Ct. 681 (1969). In this opinion written by Judge Frank Johnson, the three judge panel concluded that as long as an institution of higher education has nondiscriminatory admissions and hiring policies, and "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." 289 F. Supp. at 789-90. The court, noting the necessity for different legal standards to be applied between elementary-secondary education and higher education, reasoned that as far as college admissions are concerned, unlike elementary and secondary education, higher education is neither free nor compulsory, and freedom to choose where one will attend college performs the important function of fitting the right school to the right student. In dissenting from the affirmance of this opinion by the United States Supreme Court, Justice Douglas recognized the import of this decision by saying: "The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on the one hand and colleges and universities on the other." *Alabama State Teachers Association v. Alabama Public School and College Authority*, 393 U.S. 400, 401 (1969). Likewise, the Fifth Circuit, in an opinion binding in the Eleventh Circuit, stated: "Well established principles of public school desegregation have not been applied generally to institutions of higher learning in the same manner in which they have been applied to public schools below the college level." *Lee v. Macon County Board of Education*, 453 F.2d 524, 527 (5th Cir. 1971).

B. This Court, by requiring the utilization of the Office of Education's "Revised Criteria" in formulating a plan, is permitting the development of an expensive and educationally unsound remedy in this case, similar to that Judge Edenfield of the Southern District of Georgia found inappropriate under legal standards in this Circuit in *Artis v. Board of Regents of the University System of Georgia*, Civil Action No. CV-479-251 (S.D. Ga. Feb. 2, 1981), and which the Fifth Circuit has recently refused to hold to be constitutionally required. See *Ayers v. United States*, 769 F.2d 311 (5th Cir. 1985).

C. This Court has found liability of the Board of Trustees of The University of Alabama, a public corporation and constitutional instrumentality of the State of Alabama, on the liability claims of the United States under Title VI and the Fourteenth Amendment, without any finding of program specific or any other violations by this defendant as required by Title VI and *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912 (1982), *Grove City College v. Bell*, —— U.S. ——, 104 S.Ct. 1211 (1984) and *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969). Additionally, this Court, contrary to prevailing precedent, has apparently held that the Attorney General of the United States, in the absence of any statutory authority, has standing to bring its Fourteenth Amendment claims against this state entity. See *United States v. Philadelphia*, 644 F.2d 187 (3rd Cir. 1980), *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979) and *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). Further, this Court has held that A & M and ASU as state entities have standing and the right to sue the State of Alabama and other State of Alabama entities, such as this defendant, in this action. Additionally, this Court has apparently held that the doctrine of sovereign immunity is not a defense to the actions of ASU and A & M herein.

3. An immediate appeal from such order will materially advance the ultimate termination of the litigation because probably no remedy hearing would be necessary if the appellate courts were to adhere to a non-discrimination-good faith legal standard in this area and such standard were used in judging the conduct of the defendants. However, in the event the appellate courts were to affirm the legal standard enunciated by this Court, or were to announce a new standard, the remedy phase of the action could be tried and decided with certainty. Thus, under any state of facts, an immediate appeal would be beneficial to the ultimate termination of the litigation.

4. This order may be appealable as of right under 28 U.S.C. § 1292(a)(1) because this Court has required the submission of a plan utilizing the "Revised Criteria". Cf. *Board of Public Instruction of Duval County v. Braxton*, 326 F.2d 616 (5th Cir. 1964) with *Hoots v. Commonwealth*, 587 F.2d 1340 (3rd Cir. 1978). However, this point is not clear, and it would certainly be desirable to have an order from this Court permitting an immediate appeal. See generally *Taylor v. Board of Education*, 288 F.2d 600 (2nd Cir. 1961), cert. denied, 368 U.S. 940 (1961).

5. The defendant Board of Trustees of The University of Alabama further moves the Court for an order staying further proceedings in this Court pending an appeal by the defendant Board of Trustees of The University of Alabama from the above described order, as amended.

Done this 17th day of December, 1985.

Respectfully submitted,

ROBERT L. POTTS
C. GLENN POWELL
STANLEY J. MURPHY
ROBERT W. RIEDER, JR.
CHARLES H. SELF, JR.
JOHN CATES

By: /s/ Robert L. Potts
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401 Queen City Avenue
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205/348-5121

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO AMEND INTERLOCUTORY ORDER TO INCLUDE STATEMENT PRESCRIBED BY 28 U.S.C. § 1292(b) TO ALLOW AN IMMEDIATE APPEAL AND MOTION FOR A STAY has been served by me on all parties in this action by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following counsel of record all on this the 17th day of December, 1985.

Mr. Ronald W. Wise
Mr. Charles Coody
Mr. John C. Falkenberry
Mr. Thomas Thagard
Mr. Walter Merrill
Mr. Frederick Ingram
Mr. Frank Ellis, Jr.
Mr. T. Michael Putnam
Mr. James U. Blacksher
Mr. Frank W. Donaldson
Mr. Nathaniel Douglas
Mr. Levern M. Younger
Ms. Jeanne K. Pettenati
Ms. Judith F. Ledbetter
Mr. Ira Dement
Mr. Joe R. Whatley, Jr.
Mr. Solomon Seay, Jr.
Mr. Edward Allen
Mr. William F. Murray, Jr.
Mr. Richard F. Calhoun
Mr. Carl E. Johnson
Ms. Maxey Roberts
Mr. Donald V. Watkins
Ms. Caryl Privett
Mr. Franz R. Marshall
Mr. Jay P. Heubert
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 5, 1986]

NOTICE OF APPEAL

Notice is hereby given that The Board of Trustees of The University of Alabama, a public corporation, and the individual members thereof, defendants in the above action, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a) hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Order and Memorandum of Opinion filed herein on December 7, 1985, and entered herein on December 9, 1985, as amended on December 9, 1985, and January 17, 1986.

ROBERT L. POTTS
C. GLENN POWELL
STANLEY J. MURPHY
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By: /s/ C. Glenn Powell
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

THE STATE OF ALABAMA, *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Auburn University and its Board of Trustees (hereinafter referred to as "Auburn University" or "Auburn"), defendants herein, hereby appeal to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a), from the Order and Memorandum Opinion entered in this action on the ninth day of December, 1985.

Bases for Appeal of the Court's Memorandum of Opinion and Order

Auburn's appeal is brought pursuant to 28 U.S.C. § 1291, which provides that Courts of Appeals shall have jurisdiction of appeals from final judgments of United States District Court and, alternatively, pursuant to 28 U.S.C. § 1292(a)(1), which provides that Courts of Appeals shall have jurisdiction of appeals from interlocutory orders granting injunctive relief. These alternative bases for appeal will be developed herein.

Statement of Facts

This action was commenced by the United States on June 11, 1983 against the State of Alabama, its Governor, its State Board of Education, ten state colleges and universities, the Alabama Commission on Higher Education and the Alabama Public School and College Authority. The action was brought pursuant to Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.

The Complaint alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education had made findings that the State of Alabama was in violation of Title VI by failing to eliminate the vestiges of a former racially dual system of higher education. The Complaint also alleges that upon failure of the State of Alabama to present a desegregation plan satisfactory to the Department of Education, such Department referred the matter to the Department of Justice for enforcement.

The Complaint states that prior to 1953, the State of Alabama established and maintained a racially dual systerm of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. Among the defendant institutions, the Complaint alleges Alabama A&M University and Alabama State University to be traditionally black institutions and all others, including the defendant Auburn University, to be traditionally white institutions.

On July 25, 1983 a motion was filed by Alabama A&M University to be realigned as party plaintiff in order to assert Title VI, 42 U.S.C. § 1981 and 1983 and Fourteenth Amendment claims against Auburn University,

the University of Alabama and the State of Alabama. A similar motion was filed by Alabama State University on August 3, 1983. The Court granted these motions and gave Alabama A&M and Alabama State leave to assert claims, as plaintiffs, against the defendants.

On September 6, 1983, Auburn University moved to disqualify the trial judge pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455. As grounds therefor, Auburn asserted, *inter alia*, that the trial judge was biased and prejudiced against it and in favor of the realigned plaintiffs Alabama A&M University and Alabama State University and that his relationship with Mr. Donald Stewart, counsel for Alabama A&M, who as a United States Senator had sponsored his nomination as a United States District Judge three years earlier, was such that a reasonable person might doubt his impartiality. This issue was particularly important to Auburn because Alabama A&M was asserting a right to administrative control, in the northern half of Alabama, of the Alabama Cooperative Extension Service and the Alabama Agricultural Experiment Station, both of which have been administered by Auburn University for seventy-five years. Auburn also alleged that the trial judge had extrajudicial access to facts relevant to the present action because he was one of the attorneys for plaintiffs in *Lee v. Macon County Board of Education*, the previous statewide public school and college desegregation suit in Alabama.

The trial court overruled the motion to disqualify. On October 12, 1983, Auburn University filed a petition for writ of mandamus with the Eleventh Circuit Court of Appeals setting forth that its motion for disqualification under both 28 U.S.C. § 144 and 28 U.S.C. § 455 should have been granted. The Court of Appeals held Auburn's § 144 affidavit to be legally sufficient but remanded the matter with directions that another judge be assigned to hear the recusal proceedings. On December 19, 1983, Judge Hobart H. Grooms of the United States District

Court for the Northern District of Alabama entered an opinion and order finding that a reasonable person would harbor a doubt as to the trial judge's impartiality and granting Auburn's motion for recusal. On January 19, 1984, Judge Grooms vacated his order and recused himself, stating that the recusal proceedings should be heard by a judge who was not a member of the United States District Court for the Northern District of Alabama. On February 13, 1984, the matter was heard again before the Honorable Judge David W. Dyer who, on March 16, 1984, denied Auburn's motion for recusal of the trial judge.[1]

On September 15, 1983, a class of individuals described as "students, alumni, faculty and administrators of Alabama State University," represented by John F. Knight,

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[1] Subsequently, in June of 1984, the United States District Court for the Northern District of Georgia compelled the United States to produce documents requested by Auburn during depositions of United States Department of Education personnel in Atlanta. These documents included a newspaper clipping attached hereto as Exhibit A, which relates the trial judge's actions while a member of the Alabama State Senate in leading a filibuster, on racial grounds, in opposition to the appointment of a white person as a member of the board of trustees of predominantly black Alabama State University. The existence of this document was unknown to this defendant at the time the recusal motions were being considered, and it is obviously relevant on that issue. But it is also relevant on the merits. Dr. Steven Wright, a United States' expert witness, gave opinion evidence that racial integration of institutional governing boards is important to the elimination of racial identifiability of student bodies. The article was made an exhibit to Dr. Wright's deposition, but the trial court refused to permit cross-examination of the witness on this issue and refused to allow the deposition and its exhibits to be introduced into evidence at trial. In the trial court's Memorandum Opinion, the racial identifiability of institutional governing boards, including Alabama State's, was considered "probative" to the "question of whether the dual system has been disestablished." Opinion at 62, 75. The fact that the "Governor has generally appointed blacks to the board" was characterized as a vestige of segregation. Opinion at 75.

Jr., moved the Court to intervene in the present action. The "Knight Intervenors" sought in their complaint in intervention to eliminate the "vestiges of prior *de jure* segregation" alleged to be present in the three Montgomery, Alabama public institutions of higher education, Auburn University at Montgomery, Alabama State University and Troy State University at Montgomery. The Knight class was certified and intervention was allowed by the District Court on January 3, 1985.

After one and one half years of intensive discovery, in which a number of disputes arose, including one area of controversy that resulted in conflicting decisions by the trial court and Judge Marvin Shoob of the United States District Court for the Northern District of Georgia, the case was tried during the entire month of July and the first week of August, 1985. The trial involved 9000 pages of transcipt, and over 1,700 exhibits were introduced.

On December 9, 1985 the Memorandum of Opinion and Order, which concluded "that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; that in other respects, the 'root and branches' of the dual system have not been eliminated," was entered. Memorandum of Opinion at 2. The court ordered the "Defendants State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority [to] submit to the Court not later than February 14, 1986, a plan to elimiante all vestiges of the dual system of higher education in Alabama." The Court's Order specified that within fifteen days the "affected institutions" will submit their "comments or objections" to the plan in twenty-five pages or less. *See* Order at 2.

In its opinion, the trial court declared no longer viable a United States Supreme Court decision from this circuit, *Alabama State Teachers Association v. Alabama Public*

School and College Authority, et al., 289 F. Supp. 784 (M.D. Ala 1968), *aff'd.* 393 U.S. 400 (1969), which has not been overruled and which establishes duties and principles of law in relation to desegregation in higher education that are irreconcilable with the District Court's Order.

The Court's Memorandum of Opinion, with a high degree of specificity, makes the following findings, *inter alia*,

1) that "[t]he continued recognition of a special 'constitutional status' for the University of Alabama and Auburn due to their inclusion in the 1901 constitution, when Alabama State and Alabama A&M were omitted from the said constitution for racial reasons, is a vestige of the dual school system." (Opinion at 91),

2) that the assignment of the Alabama Agricultural Experiment Station and the Alabama Cooperative Extension Service to Auburn University is unconstitutional, (Opinion at 56, 61-62),

3) that Auburn University's admissions requirements impermissibly exclude blacks from attendance at Auburn, (Opinion at 71-72),

4) that Auburn does not actively recruit blacks for faculty positions (Opinion at 71),

5) that "[t]here is substantial needless duplication of the education and business programs offered by AUM [Auburn University at Montgomery] and ASU [Alabama State University]," and that "[t]he presence of duplicated programs at AUM—a much newer and more attractive facility than ASU—has a negative impact on which enrollment at ASU," (Opinion at 75),

6) that the "undergraduate and graduate teacher education and certification programs offered at

UAH [University of Alabama in Huntsville] unnecessarily duplicate similar and older programs offered at [Alabama] A&M" and thereby reduce its white enrollment, (Opinion at 66-67),

7) that computer science courses at UAH unnecessarily duplicate similar courses at A&M thereby reducing white enrollment at A&M, (Opinion at 67),

8) that the races of the chief executive officers of the Alabama public institutions of higher education is a vestige of the prior *de jure* segregated system of higher education, (Opinion at 89),

9) that "Alabama's choice of resources allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and [Alabama] A&M to attract white students," (Opinion at 89), and

10) that the state's financial resource allocation for things other than facilities has caused Alabama A&M's and Alabama State's student bodies to remain segregated, (Opinion at 90-91).

In the Order appealed from, the District Court ordered and directed that each of these "vestiges" be eliminated, directing that a plan to eliminate them be submitted by four of the defendants by February 14, 1986 and permitting Auburn and others to comment within fourteen days in twenty-five pages or less.

The grounds for Auburn's appeal will be embraced in two general headings, *viz*: (1) errors in the Court's legal conclusions and evidentiary findings on the merits and (2) error in denying Auburn's recusal motion under the facts as set out in Auburn's 28 U.S.C. § 144 affidavit and as presented at the hearings on recusal.[2]

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[2] As held by the Eleventh Circuit in considering Auburn's petition for mandamus, "The affidavit sets forth sufficient factual allegations

Auburn will establish in its brief to be filed later in this appeal that the District Court's Memorandum of Opinion and Order apply incorrect legal principles and make factual findings that are clearly erroneous. The evidence presented during the trial of this action established that race played no part in the Alabama constitutional provisions vesting management and control of Auburn University and the University of Alabama in their boards of trustees, that AUM has been a race neutral institution since its creation, that allocation of state financial resources has not disfavored ASU or A&M, that Auburn's status as administrator of Alabama's statewide Agricultural Experiment Station and statewide Cooperative Extension Service[3] has nothing to do with race, that the ACT as used by Auburn is a valid test and that Auburn actively recruits black faculty. Auburn will also establish that based upon the evidence available prior to the March, 1984 order on recusal, it was abundantly clear that the trial judge has an extrajudicial bias against Auburn as well as against others for whose actions the United States contends Auburn is to be held accountable.[4]

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to require that the 'judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.' 28 U.S.C. § 144." The record will demonstrate that in denying Auburn's recusal motion, Judge Dyer did not find that the facts presented in the § 144 affidavit were untrue.

[3] The administrative structure of the Alabama Cooperative Extension Service was desegregated and reorganized pursuant to court orders in *Strain v. Philpott*, CV840-E, United States District Court for the Middle District of Alabama, which currently exercises continuing jurisdiction over these matters.

[4] The United States has never cited or relied on "institutional" violations of Title VI; indeed, the Department of Education investigation found none. Rather, the United States has focused throughout on a "statewide" approach that disregards institutional innocence, contrary to *Grove City College v. Bell*, —— U.S. ——, 104 S. Ct. 1211 (1983), and for that reason bias of the trial judge for or against any institution agency or official of higher education in Alabama has the potential to impact upon Auburn University under the United States' approach to this case.

The Court's Order and Memorandum of Opinion Constitutes a "Final Judgment" Appealable Pursuant to 28 U.S.C. § 1291

28 U.S.C. § 1291 provides that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ., except where a direct review may be had in the Supreme Court.

What constitutes a "final decision" has been the subject of extensive discussion in the appellate courts of the United States, especially where the district court appears to have decided less than all of the issues in the case or where, as here, the court orders one or more of the parties to devise a plan to implement its decision.

The United States Supreme Court addressed just such an issue in *Brown Shoe Company, Inc. v. United States*, 370 U.S. 294 (1962). *Brown Shoe* was an appeal brought pursuant to the Expediting Act, 15 U.S.C. § 29,[5] from a decision of a district court in an antitrust action.

The district court's order in *Brown Shoe* held that the merger of Brown Shoe Company with Kinney Shoe Company substantially lessened competition in the family shoe market and constituted a violation of the Clayton Act, 15 U.S.C. § 18. *See United States v. Brown Shoe Company*, 179 F.Supp. 721 (E.D. Mo. 1959). The district court ordered the defendant Brown Shoe Company to "relinquish and dispose of the acquired stock of defendant Kinney" and enjoined "Brown and Kinney, their agents, servants, officers and employees from acquiring

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[5] The Expediting Act provides that the United States Supreme Court has jurisdiction of appeals from final orders of United States district courts in antitrust cases in which the United States is a party.

any interest in the stock or assets of the other defendant." *See* 179 F. Supp. at 741.

The district court, recognizing the complexity of the situation and the difficulty of implementation of the divestiture, held that it "should hear any evidence which the defendants might wish to offer touching the effects of the disposition of the stock and the suitable manner in handling same. The government should be given an opportunity to express opposition or suggestion therein." 179 F.Supp. at 742. The court held that no "final" judgment would be entered until after such hearing and the approval by the court of an acceptable plan for divestiture. 179 F.Supp. at 742.

Brown Shoe Company appealed the order of the district court immediately, without waiting for a decision from the district court adopting a plan for the divestiture. The United States Supreme Court raised the issue of the finality of the district court's decision on its own, stating that, "[i]t was suggested from the bench during the oral argument that, since the judgment of the District Court does not include a specific plan for the dissolution of the Brown-Kinney merger, but reserves such a ruling pending the filing of suggested plans for implementing divestiture, the judgment below is not 'final' as contemplated by the Expediting Act." 370 U.S. at 305. The Court, after noting that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action,'" 370 U.S. at 306; held that the decree of the district court "had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time." 370 U.S. at 308.

The Supreme Court held that the requirement of the submission of a plan designed to implement the order for divestiture did not deprive it of jurisdiction since, in the event the District Court's order was affirmed, "the sole

remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree, . . . are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case in its present posture a proper one for review now." 370 U.S. at 308.

The Court's decision that the order was final was buttressed by the fact that "[a]ppellant here does not attack the full divestiture ordered by the District Court as such; it is appellant's contention that under the facts of the case, as alleged and proved by the Government, *no* order of divestiture could have been proper. The propriety of divestiture was considered below and is disputed here on an 'all or nothing basis' " 370 U.S. at 308-309.

An additional reason cited by the Court for deciding the issue in favor of finality was the magnitude of the divestiture ordered by the district court. The Court held that "[s]uch an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws." 370 U.S. at 309.

Thus, the Court ruled that where the order of a district court makes clear the result sought, the fact that the method for the accomplishment of the result is yet to be established does not render the court's decision any less "final." Rather, when the court has decided the issue of liability and has ordered the relief sought in the complaint, the fact that further rulings of the district court may be necessary to implement or administer its decree does not deprive the appellate court of jurisdiction. *See* 370 U.S. at 308.

In *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the United States Supreme Court defined and elaborated on the principles applied in *Brown Shoe* in holding that the requirement of finality is to be given a "practical rather than a technical construction." The Court held that questions in the so-called "twilight zone of finality" should be decided by balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," as well as by considering the importance of the question presented to "the further conduct of the case." 379 U.S. at 152-153. The court in *Gillespie* conclusively established that in order to be "final," a decision need not be "the last order possible to be made in a case." 379 U.S. at 152.[6]

In *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974) *cert. denied*, 419 U.S. 1108 (1974), the Sixth Circuit Court of Appeals applied the principles set forth in *Gillespie* to an order of a district court that individual plaintiffs had made out a case under the Fair Housing Act that municipal defendants had violated the plaintiffs' constitutional rights by refusing to execute cooperation agreements with a housing authority to construct low-cost housing. The district court "treated the case before him like a school desegregation case and ordered CMHA [the housing authority] 'to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs.' " 500 F.2d at 1090. The court held

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[6] *See Thoms v. Heffernan*, 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds*, 418 U.S. 908 (1974), in which a decision of a United States District Court declared a flag misuse statute unconstitutional but neither granted nor denied injunctive relief. The Court of Appeals held that "[t]he fact that further proceedings leading to an injunction are possible below does not render the judgment of the district court in this case any less final." 473 F.2d at 481.

that the municipal defendants had the burden of showing "a compelling necessity" for not complying with the plan submitted. 500 F.2d at 1090-91, n.3.

The municipal defendants appealed prior to the submission of the court-ordered plan, and the Court of Appeals addressed the issue of finality as follows:

> *Gillespie* indicated that an appellate court should give consideration to four factors in determining whether an order of a lower court is 'final' within the meaning of 28 U.S.C. § 1291:
>
> 1. Whether an order is final depends on whether it has been given a 'practical rather than technical construction,' . . .
> 2. Whether an order is final depends on whether the issue appealed is fundamental to the further conduct of the litigation. . . .
> 3. Whether an order is final depends on whether the parties will be put to additional expenses if the appealed issue is not resolved by the appellate court.
> 4. In cases where the issue of finality is close or marginal, the court of appeals should find in favor of finality.

500 F.2d at 1090-91, n.3.

The *Mahaley* court held that the four elements of finality, as they applied to the case before it, were satisfied in that: 1) the district court had, in effect, rejected any reason the municipal defendant might advance for not executing the cooperation agreements in question, 2) the question of whether the municipalities had violated 42 U.S.C. § 1983 by their refusal to sign cooperation agreements was "fundamental to the further conduct of this case," 3) the inconvenience and cost of a second trial would be great, especially since "the trial record contains

all the evidence necessary for this Court to make a full and complete disposition of all of the issues in the case," and 4) the issue of finality was not even close. *See* 500 F.2d at 1091, n.3.

In *Morales v. Turman*, 535 F.2d 864 (5th Cir. 1976), *rev'd* 430 U.S. 322 (1977) (expressly affirming on the issue of the finality of the district court's order), the Fifth Circuit Court of Appeals reviewed the decision of the United States District Court for the Eastern District of Texas that the constitutional rights of minors incarcerated in Texas juvenile correctional facilities had been violated and ordering all parties to meet and agree upon a plan to eliminate the unconstitutional conditions found by the district court in accordance with certain "minimum standards" enumerated by the court in *Morales v. Turman*, 333 F.Supp. 53 (E.D. Tex. 1974). The Fifth Circuit held that the district court's order was final under 28 U.S.C. § 1291, stating:

> Appellees concede the finality and appealability of the lower court's determination that the constitutional rights of minors incarcerated by the TYC have been violated. They maintain, however, that the detailed 'minimum standards' necessary for protection of those rights—particularly the right to treatment—are not final because the judge withheld issuance of permanent injunctive relief pending submission of a comprehensive plan to be drawn up by the parties. The difficulty with this contention is that while some flexibility was left to the parties in determining precisely how compliance with the minimum standards would be structured, the District Court made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion. *See* 383 F. Supp. at 126. In circumstances such as these, the requirement of finality must be given a practical construction. *See Gillespie v. United States Steel Corp.*, 379

> U.S. 148, 152-53, 85 S.Ct. 308, 311, 13 L.Ed. 2nd 199 (1964). The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable.[7]

535 F.2d at 867, n.6.

The Fifth Circuit rejected the contention by the appellee that the minimum standards established by the district court were "mere guidelines subject to further negotiation by the parties." Rather, the court held that the district court's opinion constituted:

> "a final ajudication determining the minimal content that must be given to the 'right to treatment' as it applies to virtually every aspect of TYC operations."

535 F.2d at 867, n.6.[8]

As in *Brown Shoe*, the district court order has made specific findings of illegal conditions and practices, and has ordered the state to submit a plan to eliminate those conditions and practices. "The sole remaining task for the District Court will be its acceptance of a plan [to eliminate the vestiges][9] and the supervision of the plan

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[7] The United States Supreme Court, though reversing on the merits, expressly affirmed the Fifth Circuit's holding as to finality.

[8] The *Morales* opinion is consistent with the Fifth Circuit's decision in *Board of Public Instruction of Duval County v. Braxton*, 326 F.2d 616 (Fifth Cir. 1964). In *Braxton*, the Fifth Circuit held that the order of a district court in a school desegregation case that a plan be submitted that would eliminate certain specified unconstitutional conditions in the school system was appealable because it foreclosed any discretion on the part of the school board ordered to submit the desegregation plan by specifically enumerating the conditions to be eliminated. *See* 326 F.2d at 619.

[9] It would not be inaccurate to say that the district court has ordered the defendants to "divest" themselves of the "vestiges" it

so accepted." *See Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962). *Brown Shoe* illustrates that the court's decision is not merely a decision on liability, leaving remedy to be decided at a later time.

It is clear that, as in *Morales*, the court in the instant case, while leaving some "flexibility" to the State in determining precisely how the elimination of the vestiges would be accomplished, "made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion." *See Morales*, 535 F.2d at 867, n.6. "The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable." *See Morales*, 535 F.2d at 867, n.6. As the Fifth Circuit stated in *Morales*, the vestiges found by the Court "constitute a final adjudication determining" the conditions in Alabama's public institutions of higher education which must be either eliminated or changed in strict accordance with the court's Opinion in order for any plan submitted by the State to comply with the order.

The court's exclusion of Auburn and the other state institutions of higher education from the planning process is another ground for deciding the question of practical finality in favor of Auburn. From its standpoint, Auburn has been found guilty and has no say as to remedy in this case other than to object to and comment upon the plan submitted by the State defendants in twenty-five pages or less. The exclusion of Auburn from the planning process effectively ends the trial as

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found. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 305 (1962). As in *Brown Shoe*, the United States received *everything* it asked for, an order requiring the submission of a plan designed to eliminate the alleged vestiges of the prior racially dual school system.

far as Auburn is concerned and makes the court's decision final.

The other three elements of finality enumerated by the *Mahaley* court are all in favor of finality in this case. First, there is no question that the correctness of the court's decisions with regard to the vestiges cited by the court in its Memorandum of Opinion, including the constitutional status of Auburn, the administration of the Alabama Agricultural Experiment Station and Alabama Cooperative Extension Service [10], Auburn's admissions requirements and the duplication of programs is fundamental to the further conduct of this case. Reversal of the court on these issues would have a profound impact on its finding of liability in general and completely redefine any remedy ordered.

Next, the inconvenience and cost of a second trial in this case, should the court's decision be reversed, as well as the expense of discovery and a hearing in the remedial phase, justify appeal at this time, especially since, as in *Mahaley*, "the trial record contains all of the evidence necessary for [the Appellate Court] to make a full and complete disposition of all of the issues in this case." 500 F.2d at 1091. This factor is particularly important in this case since, as in *Brown Shoe*, administration of the remedy will likely be a lengthy and complicated task.

A reversal by the Court of Appeals on any of the major issues before it on this appeal, such as whether the District Court had jurisdiction of claims relating to programs administered by the United States Department

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[10] Title VI enforcement authority for these programs rests with the U.S. Department of Agriculture under 7 CFR Part 15, and the appendix thereto. USDA has found them to be *in compliance* with Title VI, and USDA had no role in bringing this action. These programs were not, and could not properly have been, included in the Title VI investigation by the Department of Education, which caused this action to be filed.

of Agriculture,[11] whether program transfers are necessary or appropriate between Auburn University in Montgomery[12] and Alabama State University, whether Alabama A&M and Alabama State have been discriminated against in terms of financing and capital improvements or whether Auburn's use of high school grades in combination with the American College Test as an admissions criterion is valid, would, if decided in Auburn's favor, narrow the scope of relief in the case and thereby reduce the time and expense associated with the implementation and administration of any plan approved by the court. Similarly, and perhaps even more importantly, reversal on the issue of recusal at this point in the proceedings would be more economical than reversal after the approval and implementation of a plan.

Finally, any court-approved plan that is designed to alter the racial composition of students and faculty at the defendant universities would be more effective if the legal conclusions and factual findings underlying the implementation of the plan were reviewed by this Court prior to the plan's implementation. The success or failure of any plan approved by the court will depend not only upon the efforts of the parties but upon the public's perception of its permanence. A plan perceived as temporary pending review by the Court of Appeals will not likely affect attendance patterns of students nor application flow for faculty positions. On the other hand, if the order requiring submission of a plan is not reviewed now, the administration of the plan will disrupt, perhaps needlessly, the education of students and affect employ-

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[11] See note 10 *supra*.

[12] AUM was created after legal segregation ended in Alabama, and it is undisputed that it has never been segregated or discriminated against anyone on the basis of race. Its creation was approved in *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969).

ment of faculty, including tenured faculty, at institutions whose programs are altered consistent with the court's opinion. "The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling" the implementation of the plan "would only make still more difficult the task of assuring expeditious enforcement" of the civil rights laws. *Cf. Brown Shoe Company v. United States*, 370 U.S. 294, 309 (1962).

Finally, since the Court of Appeals should find in favor of finality "where the issue of finality is close or marginal," the similarity of the case at bar to the *Brown Shoe, Mahaley,* and *Morales* cases should compel a determination that the court's Memorandum of Opinion and Order are final and appealable.

The Court's Order is a Mandatory Injunction Appealable Pursuant to 28 U.S.C. § 1292(a)(1)

An order requiring the submission of a plan to implement a decision of a United States district court may be appealable as a final decision, under 28 U.S.C. § 1291, or as an interlocutory mandatory injunction appealable under 28 U.S.C. § 1292(a)(1). *See Morales v. Turman*, 535 F.2d 864, 867, N.6 (5th Cir. 1976), *rev'd.* 430 U.S. 322 (1977) (expressly affirming on the issue of finality). In the present case, even if the order of the district court is not a "final decision", it is a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1).

In *Board of Public Instruction v. Braxton*, 326 F.2d 616 (5th Cir. 1964), the Fifth Circuit Court of Appeals held that the order of the United States District Court for the Middle District of Florida requiring a county school board to submit a plan designed to eliminate segregation in the county's schools was a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1). The court distinguished the case before it from *Taylor v. Board of Education*, 288 F.2d 600 (2nd Cir. 1961), which held that a similar order was not appealable, on the

grounds that the Florida court's order denominated certain practices and conditions which should be addressed by the plan. To the extent the Second Circuit held otherwise in *Taylor*, the Fifth Circuit expressly differed with that court's judgment. *See Braxton*, at 619. In the instant case, as in *Braxton*, the district court has ordered the State to submit a plan eliminating vestiges specifically enumerated by the court in its order. Thus, the court in this case, as in *Braxton*, "positively and affirmatively directed that a plan be submitted that *would provide for carrying out*" the elimination of the vestiges noted (emphasis supplied by court). *See* 326 F.2d at 619.

The fact that only the Governor, the Alabama Commission on Higher Education and the Alabama Public School and College Authority were ordred to prepare and submit the plan does not render the order unappealable as to Auburn. A litigant who was a party below and who is aggrieved by the judgment or order may appeal the judgment or order. *See e.g. Burleson v. Coastal Recreation, Inc.*, 572 F.2d 509 (5th Cir. 1978). In the present case, Auburn has clearly been "aggrieved" by the court's Memorandum of Opinion and Order. It has been held guilty of racial discrimination and of being a part of a segregated system of higher education of the State. The court has ordered that its state constitutional status violates the United States Constitution and that its status as the premier land-grant institution in the State of Alabama is due to impermissible racial motives. Its use of the ACT test as an admissions criterion has been held invalid. Critical programs at AUM, which without dispute has never discriminated based on race, have been characterized as vestiges of an era in which it did not exist.[13] The Court has ordered the State to submit a plan which would eliminate all of these conditions that Auburn has defended as race neutral and sought to preserve. Thus, Auburn is clearly "aggrieved" by the

[13] See note 12 *supra*.

Court's opinion, even if it has not been ordered, or allowed, to participate in the preparation and submission of the plan.

Even non-parties have been allowed to appeal judgment of United States District Courts if the court's decree significantly affects their interests; *see e.g., United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *Securities and Exchange Commission v. Lincoln Thrift Association*, 577 F.2d 600 (9th Cir. 1978); *West v. Radio-Keith Orpheum Corp.*, 70 F.2d 621 (2d Cir. 1934); or requires action on their part to effectuate the remedy. *See Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). In both *Securities and Exchange Commission v. Lincoln Thrift Association*, and *West v. Radio-Keith Orpheum Corp.*, non-party creditors who asserted rights in receivership proceedings were allowed to appeal orders affecting their legitimate interests. In *Chagra* as well as in many other cases from the Fifth Circuit, non-parties were allowed to appeal orders of district courts enjoining the publication of court files or the closure of hearings from the public. *See also Belo Broadcasting Corp. v. Gurney*, 654 F.2d 423, 425-426 (5th Cir. 1981); *United States v. Gurney*, 558 F.2d 1202, 1206-07 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

In *Brown v. Board of Bar Examiners of State of Nevada*, 623 F.2d 605 (9th Cir. 1980), the district court dismissed the Board of Bar Examiners of the State of Nevada from an action to enjoin the state from denying a graduate of an unaccredited law school admission to the state bar. Nevertheless, the court issued a preliminary injunction enjoining the "defendants" from preventing Brown from sitting for the bar examination. 623 F.2d at 607. Because the Supreme Court of Nevada had delegated to the Board of Bar Examiners the power to examine applicants for admission to the Bar, the Ninth Circuit Court of Appeals held that the Board was a proper party to appeal the district court's ruling, regard-

less of the lower court's holding that the Board was due to be dismissed from the case. 623 F.2d at 607. Auburn will be required to comply with whatever plan is approved by the Court regardless of its participation in plan formulation. Therefore, Auburn would be a proper party to appeal even were it not a party to the litigation.

Conclusion

Auburn has asserted two bases for appeal of the court's Memorandum of Opinion and Order. First, the Memorandum of Opinion and Order constitute a "final decision" appealable pursuant to 28 U.S.C. § 1291 because its practical effect is to decide all of the issues, including remedial issues, in the present action. Alternatively, if interlocutory, the order is a mandatory injunction appealable pursuant to 28 U.S.C. 1292(a)(1) because it specifies the elements to be addressed by the plan submitted by the state defendants. Based upon the foregoing legal authorities, the memorandum of opinion and order are appealable by Auburn University without further action by the United States District Court for the North District of Alabama. In this appeal, the grounds will be error in legal principles applied and clear error in findings of fact, both on the merits and regarding recusal.

SAMFORD & SAMFORD and
BALCH & BINGHAM

By: /s/ [Illegible]
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon the following attorneys by first-class United States mail, postage prepaid, on this 5th day of February, 1986:

Ms. Maxey V. Roberts
Mr. T. Michael Putnam
Mr. Richard F. Calhoun
Mr. Ronald W. Wise
Mr. Ira DeMent
Mr. Walter J. Merrill
Mr. Joe R. Whatley, Jr.
Mr. John C. Falkenberry
Mr. Charles S. Coody
Mr. C. Glenn Powell
Mr. William F. Murray, Jr.

Mr. Frederick Ingram
Mr. Frank W. Donaldson
Mr. Franz Marshall
Ms. Caryl Privett
Mr. Thomas M. Keeling
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/s/ [Illegible]
Of Counsel

EXHIBIT A

[Alabama Journal 6/6/77]

Solon Seeks Black Majority

CLEMON OPPOSING ASU BOARD NOMINATION

By LENORE REESE

The chairman of Alabama State University's board of trustees may never be confirmed by the State Senate because of what one black senator has termed "racially discriminatory" actions by Gov. George Wallace.

Tom Radney, a white Alexander City attorney and former state senator has been serving as board chairman since March 1975, although he had never been approved by the Senate.

And he won't be, according to Sen. U. W. Clemon of Birmingham, who said today he'll oppose Radney's confirmation because he wants a black majority on the board.

Currently the board for the predominantly black school has a 5-4 white majority.

Clemon termed Wallace's appointment of five whites and four blacks "evidence of his undying dedication to the belief that black people are incapable of governing themselves."

Radney was the only ASU trustee not confirmed by the Senate during the last regular legislative session. His name was resubmitted by the governor's office during the current special session but has remained in the Rules Committee of which Clemon is acting chairman.

Clemon said he had "ample support" within the committee to keep the appointment from being brought before the full Senate.

Contacted in Alexander City, Radney said he planned to continue serving as board chairman under his "interim appointment" by the governor despite Clemon's opposition.

Radney said he did not think Clemon's stand was a personal matter because, "I don't even know him."

"I would call his attention to my voting record in the Senate on behalf of minorities," Radney said, adding that he was "color-blind" and didn't believe in "quotas" on boards of trustees or elsewhere.

Radney was re-elected board chairman for another year last month.

Clemon said a similar situation involved confirmation of two trustees at the state's other predominantly black university, Alabama A&M in Huntsville.

He said Wallace's appointment of majority white boards of trustees at the two black schools was another example of his "racially discriminatory" behavior.

Clemon said he had no specific person in mind to replace Radney, only that he or she be a graduate of the university.

Under the bill creating the ASU board, the nine were to be appointed from each of the seven congressional districts and two from the state at large.

Before the board was created, the school was under the control of the State Board of Education.

Should Radney continue to serve without Senate confirmation, Clemon said he plans to take another look at the statute setting up the board to see if such a move would be legal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 86-7090

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA
and the individual members of its board,
Defendants-Appellants,

vs.

UNITED STATES OF AMERICA, JOHN F. KNIGHT, JR., *et al.*,
Individually and on behalf of others similarly-situated,
THE BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY and THE BOARD OF TRUSTEES FOR ALABAMA A&M UNIVERSITY,
Plaintiffs-Appellees.

(On appeal from the United States District Court
for the Northern District of Alabama, Southern Division
Civil Action Number 83-C-1676-S)

MOTION FOR A STAY OF THE DISTRICT COURT MEMORANDUM OF OPINION AND ORDER PENDING APPEAL

Comes now The Board of Trustees of The University of Alabama and the individual members of its Board (hereinafter "University"), appellants herein, and respectfully apply to this Court under Rule 8 of the Federal Rules of Appellate Procedure for a stay of the Memorandum of Opinion and Order entered on December 9, 1985, by the District Court for the Northern District of Alabama in the case of *United States of America, et al. v. State of*

Alabama, et al., Civil Action No. 83-C-1676-S, as amended as hereinafter set out, and for a stay of all further proceedings in said District Court under or pursuant to said Memorandum of Opinion and Order pending the appeal thereof. As a basis for this motion, the University contends and would show unto this Court that it is likely that the University shall prevail on the merits of its appeal; that the success and quality of its academic and public service programs and its recruitment and retention of students and faculties will likely suffer irreparable injury from a denial of this stay; that the plaintiffs and the other parties will not be substantially harmed by granting this stay; and that the public interest will be advanced if the stay is granted, as follows:

I. STATEMENT OF FACTS

The United States of America filed this action on July 11, 1983, against the State of Alabama, its Governor, its State Board of Education, its State Superintendent of Education, the ten senior public institutions of higher education in the State of Alabama, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority. The suit was brought by the Attorney General of the United States pursuant to § 601 and 602 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d and 2000d-1) and the fourteenth amendment to the Constitution of the United States. The complaint stated that pursuant to statutes, customs, and usages of the State of Alabama, a racially dual system of public senior higher education in Alabama was created and that vestiges remained in the racial identifiability of the faculty, staffs, student bodies, and governing boards of the institutions.

On July 25, 1983, a motion was filed by A&M University, and on August 5, 1983, a motion was filed by Alabama State University (the two predominantly black institutions named in the complaint of the USA), both seeking to be realigned as a party plaintiff, or in the

alternative for leave to file cross claims, in order to assert separate claims against certain of the parties, including the United States. The Court subsequently entered an order realigning A&M and ASU as plaintiffs.

On September 15, 1983, the class of plaintiffs in an action, pending in the United States District Court for the Middle District of Alabama (*Knight et al. v. James et al.*, Civil Action No. 81-H-0052-N) brought to merge into Alabama State University the predominantly white institutions operating in the Montgomery area (Auburn University at Montgomery and Troy State University at Montgomery), moved in this action to intervene as plaintiffs, and the petition was granted on April 18, 1984. Subsequently, on January 3, 1985, the Court ordered that the action would proceed as a class action with respect to the claims of the plaintiffs-intervenors and certified subclasses of graduates of Alabama State University; black adult citizens or minor children of the State who are attending, eligible to attend, or will become eligible to attend the public institutions of higher education in the Montgomery area; and black citizens who were, are, or will become eligible to be employed by the public institutions of higher education in the Montgomery area.

After extensive and continuing discovery, the trial began on July 1, 1985, and continued through August 2, 1985. Upon completion of the trial, the Court provided for and received proposed statements of fact and conclusions of law and posttrial briefs from the parties and then issued an order dated December 7, 1985, and entered on December 9, 1985, (attached hereto as Exhibit 1 and hereinafter referred to as the "Order") in conformity with its Memorandum of Opinion also dated December 7, 1985, and entered on December 9, 1985, (hereinafter the "Memorandum of Opinion"). By an order entered on December 10, 1985, corrections were made by the Court to the Memorandum of Opinion by withdrawing and substituting certain pages. The Memorandum of Opinion

with the corrected pages substituted is attached hereto as Exhibit 2. Further, on January 3, 1986, the Court granted a motion filed by Livingston University on December 13, 1985, to amend and correct certain portions of the Memorandum of Opinion relating to Livingston University but not material to the consideration of this Motion for a stay.

On December 17, 1985, the University filed a motion asking the trial court to amend its Order and Memorandum of Opinion to include the statement prescribed by 28 USC § 1292(b) to permit an immediate appeal and a motion for a stay of further proceedings in the trial court pending an appeal by it, a copy of which motion is attached hereto as Exhibit 3. Other defendants, namely, the Alabama State Board of Education and State Superintendent of Education Wayne Teague; Auburn University; Troy State University; and the State of Alabama, its Governor, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority filed similar motions seeking to take an immediate appeal under the provisions of § 1292(b), and, except for Auburn University, seeking a stay of further proceedings. On January 3, 1986, the Court made and entered an Order overruling the "various motions of the defendants, insofar as they request a stay of the Court's Order of December 7, 1985 . . . ." A copy of that order is attached hereto as Exhibit 4, and is hereinafter referred to as the "January 3 Order". The January 3 Order also provided that the parties could file briefs in support of or in opposition to the use of the "United States Office Of Education's Revised Criteria Specifying The Ingredients Of Acceptable Plans To Desegregate State Systems Of Higher Education" (hereinafter the "Revised Criteria"). (The trial court's Order directing the State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Public School and College Authority to submit to the court, not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of

higher education in Alabama directed that the plan "utilize" the Revised Criteria.) At a hearing on January 17, 1986, the trial court deleted from its Order the requirement that the plan utilize the Revised Criteria. The transcript of that hearing is attached hereto as Exhibit 5. On January 22, 1986, the trial court overruled the motion of the University seeking an interlocutory appeal under 28 USC § 1292(b) and on that same date overruled the similar motions of the other defendants.

On February 5, 1986, the University filed its notice of appeal to this Court pursuant to 28 USC § 1291 and 28 USC § 1292(a). Similar notices of appeal were filed on that same day by Auburn University, Troy State University, and the State Board of Education and the State Superintendent of Education. On February 7, 1986, Auburn University petitioned the trial court for a stay of its Order and, as of February 11, 1986, the trial court had not ruled on that petition.

THE ASU TEACHER EDUCATION PROGRAM APPEAL:

On August 15, 1985, ASU filed and on August 16, 1985, the Knight Intervenors filed separate motions in this action for temporary restraining orders seeking to enjoin the Alabama State Board of Education and the State Superintendent of Education from failing or refusing to approve certain teacher education programs at ASU. Hearings were held on these motions by the trial court on August 16 and 17, 1985. On August 20, 21, and 23, 1985, the trial court entered a series of orders which, in effect, enjoined the State Board of Education to approve certain teacher education programs at ASU. Those orders have been appealed by the State Board of Education and State Superintendent to this Court and the appeal is pending in this Court as Appeal No. 85-7582. The University was granted leave to file and has filed an

amicus curiae brief in that appeal. Many of the same legal issues underlying this case are presented in that appeal.

II. GROUNDS FOR THE MOTION TO STAY

A. *A Motion for Stay filed by the University has been denied by the trial court and any further motion for stay in the District Court would be a useless exercise.*

As set out above and as contained in Exhibit 4 (the January 3, 1986, order of the trial court), the District Court has denied the motion of the University for a stay pending the appeal of its judgment. Although that motion for stay was joined with and contained in the motion of this defendant for an interlocutory appeal under 28 USC § 1292(b), the trial court overruled those motions separately. The reiteration of a motion for a stay in the trial court would be redundant as well as futile and impractical. The stay was denied by the trial court before the § 1292(b) motions were decided.

B. *There is a likelihood that the University shall prevail on the merits of its appeal.*

As set out in the motion of the University seeking an interlocutory appeal under 28 USC § 1292(b) (pp. 3-4, Exhibit 3), the trial court expressly declined to apply, in judging whether the University is liable under Title VI and the Fourteenth Amendment, the holding in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D. Ala. 1968) *aff'd*, 393 U.S. 400 (1969) (see pp. 93-97, Memorandum of Opinion, Exhibit 2). There are significant differences between the affirmative duty to eliminate vestiges of a prior racially dual system espoused in the *ASTA* case and those which may be inferred fairly from the Memorandum Opinion of the trial court.

The *ASTA* holding that the affirmative duty to dismantle a racially dual system on the college level is satisfied by dealing in good faith with admissions, faculty, and staff is grounded in the differences between elementary/secondary schools and universities. Those differences apparently had no significance for the trial court and led it to apply the same legal standards utilized by the courts in the elementary/secondary school cases.

To the extent that the trial court's Order (Exhibit 1) grants relief to the plaintiff United States of America, it represents a departure from the controlling precedent of the Supreme Court of the United States and of this Circuit. The factual findings of the District Court (the Memorandum of Opinion attached hereto as Exhibit (2) do not support a finding of a violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*) or the fourteenth amendment to the Constitution of the United States.

No "program specific" violations of Title VI were identified by the trial court against the University in the administrative proceedings conducted by the United States which led to the filing of the complaint or at trial by the United States. In fact, the findings of the trial court in its Memorandum of Opinion were in some significant areas quite positive as to the conduct of the University in the area of race relations. As the Supreme Court has made clear, enforcement of spending power statutes such as Title VI, requires a narrowly focused, or a "program-specific" approach. See, *North Haven Board of Education v. Bell*, 102 S.Ct. 1912 (1982); and *Grove City College v. Bell*, 104 S.Ct. 1211 (1984). The requirement for such a focused enforcement effort of Title VI has long been the law of this Circuit. The requirements of *Finch v. Taylor County Board of Public Instruction*, 414 F.2d 1968, (5th Cir. 1969), were cited with approval by the Supreme Court in *North Haven*, supra., at 1926.

At the most basic level no individual was identified by the trial court as being denied access to or the benefits of any activity of the University on account of his race. No federal funds were identified by the trial court as being used by the University in a racially discriminatory fashion. Absent such findings, *Grove City* and *Taylor County Board of Public Instruction* will compel reversal.

Additionally, the trial court allowed the United States to bring this action against the University under the fourteenth amendment. Congress has never granted the power to bring such an action to the Attorney General, and absent such an express grant of statutory authority, the Attorney General was (and is) without standing to sue. See, *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); and *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). This issue has apparently not been addressed directly by this Circuit, *United States v. Marion County School District*, 625 F.2d 607 (5th Cir. 1980), but in each other circuit which has had occasion to reach the issue, the Attorney General has been denied the right to proceed under the fourteenth amendment, absent direct authorization by Congress. See *United States v. Ernst & Whinney*, 735 F.2d 1296, at 1300, n. 10, (11th Cir. 1984).

Even if the Attorney General had the power to bring this action under the fourteenth amendment, the absence of findings of direct violations on the part of the University would prevent the entry of a finding of liability on its part.

Aside from the claims of the United States, the trial court authorized the two traditionally black public institutions of higher education in Alabama (Alabama State University and Alabama A&M University) to be realigned as plaintiffs and to pursue claims in this action

on their own behalf. The question of whether or not one state agency has the right to sue another under any federal cause of action and whether or not state defendants are entitled to the protections of the eleventh amendment are central issues in the appeal already pending before this Court as Case No. 85-7582, noted earlier. The amicus brief filed by the University in that cause is attached hereto as Exhibit 6.

C. *The University is likely to suffer irreparable injury from a denial of this stay.*

In the absence of any findings that any individual has been denied access or the benefits of any program or activity of the University on the account of his or her race, the disruption and confusion caused by the Order and Memorandum of Opinion of the trial court will greatly impair the University in the maintenance of its programs and in the recruitment and retention of students, faculty, and staff, including black individuals. Attached as Exhibit 7 is an affidavit of Dr. John C. Wright, President of The University of Alabama in Huntsville, which attests to the injury occurring at his campus. The Order required the State to submit a plan by February 14 and permits the other parties to submit comments or objections to the plan within 15 days thereafter and states that the court will schedule a hearing on the plan. Consequently, that process should take a minimum of an additional month and, if the court allows a proper hearing with expert evidence and testimony, it could take from six months to a year. During that time, the findings contained in the Memorandum of Opinion and the plan, however modified through the process, shall communicate grave and significant ramifications to present and future students, faculty, and supporters of the institutions affected and to citizens and public officers involved in the political processes leading, among other things, to appropriation of State operating and capital funds to these institutions. Of course, any

plan ultimately approved by the trial court will have that same effect, but where the underlying findings and legal standards are as strongly disputed, with the likelihood of reversal on appeal, as they are in this case, then the disruption and injury that flow from creating, adopting, and operating under such a plan is unwarranted and unnecessary. A finding that the faculties of the three campuses operated by the University (UA, UAB, and UAH) are racially identifiable signals to prospective black applicants that they may not be welcomed or wanted on those campuses and impairs those campuses in a highly competitive recruitment for the limited number of black faculty applicants who are available.

As to programs at UAH that have been found to be duplicative (e.g., all professional education programs, computer science, etc.) the students and factulty involved in those programs and those who might become employed or enrolled in those programs understandably are reluctant to continue. Those programs have been jeopardized by the findings of the trial court contained in its Memorandum of Opinion. The affidavit of the President of UAH is not inclusive but should be taken by this court to be representative of the situation presented by the liability finding of the trial court.

D. *Neither the plaintiff nor any other parties will be substantially harmed by granting the stay.*

The trial court did not identify in its Memorandum of Opinion any individual who was being subjected to discriminatory treatment based on race by the University or, for that matter, by any other defendant. No student is being denied admission to or participation in any program or activity of the University on account of race and no applicant to the faculty of the University is being denied a job on the basis of race.

The plaintiffs' claims and dispute are essentially institutional claims and questions: whether the U.S. At-

torney General can sue under the fourteenth amendment or bring a Title VI enforcements action in the absence of evidence of program-specific violations; whether one state institution may sue another state institution despite standing requirements and the immunity of the elventh amendment; whether the legal standards of the affirmative duty to desegregate institutions of higher education set out in *ASTA* apply; whether one state institution may sue the State and other state institutions or "reparation" damages arising out of inequitable appropriation of capital and operating funds; and the other questions presented in this case and on this appeal, all of which are "institutional" in nature.

As the affidavit of Dr. John Wright states (pp. 4-5, Exhibit 6), any plan ultimately adopted by the court will require a number of years to implement. Any right or need for relief in this case is not immediate, and even though preferred as violations of civil rights are, they are not of such a nature to demand, and are not capable of receiving, immediately remedy or relief.

E. *A stay will advance the public interest.*

Congress has determined that the public interest is served by requiring the executive branch to focus its enforcement of Title VI on specifically identified discriminatory conduct, in specifically identified institutional activities which receive federal funds. It is also determined that the public interest is served by limiting the power of the Attorney General to bring suit under the fourteenth amendment to those specific circumstances that Congress identifies.

This Court (as the Fifth Circuit) most clearly articulated the hazards of a blunderbuss approach to the enforcement of Title VI:

> HEW was denied the right to condemn programs by association. The statute [Title VI] prescribes a

> policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own 'day in court'.

Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 at 1078 (5th Cir. 1969).

This appeal involves the most fundamental rights of the University. Among the most important of these is the right to be judged according to its own behavior. Absent a stay granted by this Court, the University will be subject to an extraordinarily complex, expensive, and disruptive remedial determination in the complete absence of any evidence or any judicial determination that it has violated any applicable civil rights law in connection with the operation and maintenance of any specific program or activity within the University. In a pluralistic society, it is critical to the best interests of its citizens that courts utilize standards that distinguish between racial compositions of student bodies and faculties that result from prior State-created racially dual systems of public senior higher education and those that result from cultural and other free and fair choices by members of its society. The trial court did not do that and apparently the legal standard it utilized does not favor such a distinction. There is a legitimate and substantial difference between the direction of the *ASTA* court and the legal standards utilized by the trial court. This is the first statewide higher education desegregation case to reach an appellate court involving the comprehensive and statewide issues that will be presented on this appeal.

To proceed to the remedy phase of this case based on the findings contained in the Memorandum of Opinion without clarifying the underlying law will result in disruption, redirection, upheaval, and reallocations of important academic and public service programs and limited resources and assets. In evaluating the possible harm that can come from denying a stay against any that may result from granting the stay appears to be no contest. On that basis, the University respectfully requests that this Court enter a stay of the Order and Memorandum of Opinion and any further proceedings by the trial court thereunder pending the outcome of the appeals filed in this case.

Done this 12th day of February, 1986.

Respectfully submitted,

ROBERT L. POTTS
C. GLENN POWELL
STANLEY J. MURPHY
ROBERT W. RIEDER, JR.
CHARLES H. SELF, JR.
JOHN CATES

By: /s/ Robert L. Potts
ROBERT L. POTTS
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/s/ C. Glenn Powell
C. GLENN POWELL
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR A STAY OF THE DISTRICT COURT MEMORANDUM OF OPINION AND ORDER PENDING APPEAL has been delivered to all parties in this action by depositing a copy of the same in the United States mail, first class postage prepaid, addressed to the following counsel of record all on this the 12th day of February, 1986.

Mr. Ronald W. Wise	Mr. Ira Dement
Mr. Charles Coody	Mr. Joe R. Whatley, Jr.
Mr. John C. Falkenberry	Mr. Solomon Seay, Jr.
Mr. Thomas Thagard	Mr. Edward Allen
Mr. Walter Merrill	Mr. William F. Murray, Jr.
Mr. Frederick Ingram	Mr. Richard F. Calhoun
Mr. Frank Ellis, Jr.	Mr. Carl E. Johnson
Mr. T. Michael Putnam	Mr. Maxey Roberts
Mr. James U. Blacksher	Mr. Donald V. Watkins
Mr. Frank W. Donaldson	Ms. Caryl Privett
Mr. Nathaniel Douglas	Mr. Franz R. Marshall
Mr. Levern M. Younger	Mr. Jay P. Heubert
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By: /s/ Robert L. Potts
ROBERT L. POTTS
General Counsel

/s/ C. Glenn Powell
C. GLENN POWELL
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EXHIBIT 7

STATE OF ALABAMA

COUNTY OF MADISON

AFFIDAVIT

My name is John C. Wright. I presently am and since 1978 have been the President of The University of Alabama in Huntsville (UAH), one of the universities constituting The University of Alabama System and subject to the management and control of The Board of Trustees of The University of Alabama, a public corporation of the State of Alabama. As President I have general responsibility for the development and operation of UAH and have primary responsibility for the quality of all academic and support programs and the employment of and the conditions of employment for all faculty and other employees of UAH.

In the Memorandum of Opinion dated December 7, 1985, entered on December 9, 1985, and subsequently amended on December 9, 1985, by the United States District Court for the Northern District of Alabama in *U.S.A., et al. v. the State of Alabama, et al.* (Civil Action No. CV-83-C1676-S), the Court found within the State of Alabama and specifically at UAH vestiges of a prior racially dual system of higher education. Among other findings affecting UAH, the Court found that the undergraduate and graduate teacher education and certification programs offered at UAH unnecessarily duplicate similar and older programs offered at Alabama A & M University, a predominately black university located in proximity to UAH (Memorandum of Opinion, p. 66) and that certain programs in computer science at UAH unnecessarily duplicate those at A & M and reduced white enrollment at A & M (Memorandum of Opinion, p. 67). The Court also found that the student body of UAH and its faculty are identifiable by race (Memorandum of

Opinion, p. 91). UAH, of course, does not believe these findings are supported by the evidence nor form a sufficient basis for a finding of liability under applicable law.

By an order dated December 7, 1985, entered on December 9, 1985, and amended on January 17, 1986, the Court ordered the State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority to submit to the Court, not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama. The Board of Trustees of The University of Alabama has appealed this order to the United States Court of Appeals for the 11th Circuit.

I am of the opinion and this affidavit is given in support of the position that UAH will likely suffer irreparable injury from a denial of a stay of the proceedings in the District Court until the liability matters can be settled on appeal, that the other parties to this action will not be substantially harmed by granting the stay and that the public interest will be advanced if this stay is granted.

First, the liability order of the Court has placed a cloud over the recruitment of students, faculty, and other staff and over the continuing vitality and attractiveness of the programs found to be duplicated and, in general, all of the program offerings of UAH. I continue to feel that UAH is operating within the letter and spirit of Title VI of the Civil Rights Act of 1964 and the 14th Amendment of the U. S. Constitution and that if legal standards previously applied in the 11th Circuit (old 5th Circuit) but expressly rejected by the trial court in this case were to be utilized in determining liability, UAH and its programs shall be found to be in compliance with the law.

Honest and good faith proposals of settlement which have become public have had a negative impact on the morale of the faculty and students at UAH and on the

ability of UAH to attract new faculty and students. Some of the proposals for remedy have suggested program transfers and closures at UAH. The present and prospective faculty and students in those areas are not likely to maintain the interest and dedication required for populated, successful, quality programs.

Certainly any plan submitted by the State will have a even greater effect in that regard because unlike settlement proposals it has at least central state government acceptability. Finally, a plan approved by the trial court will have a definite and unquestionable impact in that regard. If UAH is correct in its innocence or is correct in any substantial portion of its defense on appeal, then a different remedy will be drawn that perhaps may be less disruptive. However, by that time, the damage to the future of UAH, the regional and national image of its programs, and its general viability and potential will have occurred.

Any adverse remedial order concerning UAH programs will, by virtue of its issuance, undermine the viability of those programs. As I have said, that is already the case but it will be an even greater concern in the period of time between the promulgation of the remedy order and the final resolution of this case on appeal. Even assuming that implementation of the remedy may be stayed pending appeal, the programs will likely suffer irreparable harm because of the cloud of uncertainty created by the lower Court's remedy ruling.

Under the shadow of the Memorandum of Opinion and certainly under that of a remedy ruling, faculty and student recruitment and retention are seriously impaired. The securing and allocation of resources for the programs of UAH in the form of gifts, grants, and contracts will be disrupted.

UAH has already experienced some of these difficulties as a result of challenges to the programs by the plaintiffs

during the trial. The effect of a court order closing, transferring, or limiting any of these programs would impact them prospectively in an even more damaging way. The loss of faculty, students, and resources diverted from these programs would in a large measure be irretrievable and could not be reversed or rectified by a successful appeal. These inimical consequences are unnecessary and can be avoided by deferring the remedy phase of the litigation until the liability matters are settled on appeal.

At the same time, neither the plaintiffs nor any other parties in this action will be substantially harmed by granting the stay. Even if the vestiges found by the Court are upheld by the appellate court, their continuation during the appeal will not substantially harm any other parties. The liability findings of the Court were not so egregious that immediate relief is demanded. In fact, any plan adopted to deal with those findings will certainly take a matter of years to remedy, and some will take a lot longer. Certainly it will be more beneficial to all students and faculty in the public senior institutions of higher education in the State of Alabama to operate with certainty. To undertake one remedy plan only to find it drastically changed on appeal would be disruptive and wasteful to all students, faculty, and the taxpayers of the state. The citizens of the state are entitled to clarity and definition as they witness and choose to support or reject the concepts embodied in a remedy plan.

/s/ John C. Wright
JOHN C. WRIGHT

Sworn to and subscribed before me on this the 11th day of February, 1986.

My Commission expires:

7/17/88

/s/ Mary Layton Owens
Notary Public in and for the
State of Alabama, at large.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
Office of the Clerk
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

June 11, 1986

MEMORANDUM TO ALL COUNSEL:

No. 86-7090 United States of America, et al -v-
The State of Alabama, et al

D.C. # CV83-1676-S

Dear Counsel:

The record on appeal has been filed in the above referenced case—see enclosed memorandum. There are 180 volumes of record.

The pleadings are in Volumes I through 33 and numbered 1 through 626. The documents circled are the ones that have been included in the record.

The transcripts are in Volumes 34 through 99 and are so identified in the left margin.

The discovery pleadings are in Volumes 100 through 180 nad (sic) have been assigned x numbers—1x through 1297x. They are not circled but upon review, the only missing discovery documents are 1065x, 1090x, 1091x, 1097x, 1100x, 1106x, 1272x, 1279x, 1280x, 1281x and 1283x.

Depositions are filed as exhibits and are identified by a check mark and EXH in the left margin. In addition there are 33 boxes of exhibits and a large map.

Because of the large record and numerous parties, the briefing schedule is being enlarged. A suggested time schedule is 55 days for appellants, 45 days from date of service for appellees, and 25 days from date of service for reply briefs.

All counsel are requested to review the enclosed docket sheet, memorandum and the proposed briefing schedule and advise me *no later than June 18, 1986.*

Sincerely,

SPENCER D. MERCER
Clerk

By: /s/ Sharon Evans
Deputy Clerk

Enclosures

UNITED STATES COURT OF APPEALS

Memorandum

Date: June 11, 1986

To: Counsel of Record

From: Clerk's Office

Subject: 86-7090-USA, et al -v- State of Alabama, et al
Record on Appeal

The record on appeal in the above reference case consists of the following:

Pleadings —Volumes 1 through 33
(Document Numbers 1 through 626)

Transcripts—Volumes 34 through 99

Discovery —Volumes 100 through 180
(Document Numbers 1x through 1297x)

Exhibits —Thirty three boxes plus large map

Depositions—Filed as exhibits
Identified by check marks on District Court docket sheet and EXH in margin

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors, Appellees,

versus

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(June 6, 1986)

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

JOHNSON, Circuit Judge:

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these is-

sues were severed from the main state-wide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory—that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction

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[1] In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle*

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, *e.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); and *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are potential subdivisions of a state" are "creatures of the state, and possess no

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School District No. 1, 458 U.S. 457 (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpretation—which would bar any suit by a creature of the state against its creator—has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the *Hunter* line—including *Safety Harbor, supra*—and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound

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[2] *Cf.* City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with Board of Education v. Allen, 392 U.S. 236 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1982); P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also* Aguayo v. Richardson, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974), for an indication of the confusion surrounding this issue.

by the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra,* at 441 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *See also Town of Ball v. Rapides Parish Police Jury,* 746 F.2d 1049, 1051 n.1 (5th Cir. 1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

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[3] By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. City of Oklahoma City v. Tuttle, —— U.S. ——, 105 S.Ct. 2427, 2432 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980).[4] We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge,

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[4] *See also* Commonwealth of Pa. v. Porter, 659 F.2d 306, 327 n.3 (3rd Cir. 1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983 . . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5] Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-488 n.31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra*, at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra*, at 479-482.

no court has decided this issue.[6] We conclude that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir. 1985), *cert. denied sub nom. Grimmer v. Hardin*, 106 S.Ct. 530 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicity recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its

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[6] We note that at least five justices determined in University of California Regents v. Bakke, 438 U.S. 265, 287 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* at 281.

[7] *See* Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1978).

members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[8] Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3145 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, —— U.S. ——, 105 S.Ct. 3099, 3106 n.14 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, at 3107 n.17; *Quern v. Jordan*, 44 U.S. 332 (1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's

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[8] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Hans v. Louisiana, 134 U.S. 1 (1890), established that the amendment also proscribes suits by citizens against their own state.

[9] The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive

immunity by naming state officials as defendants. *Graham, supra*, at 3107 n.18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members*, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court had indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* at 3106 n.14; *Brandon v. Holt*, 105 S.Ct. 873, 877 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. *See Monell, supra*, at 694.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

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relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the *Young* exception applies similarly in both cases.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 302 (5th Cir. 1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1353 (11th Cir. 1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n.7 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose*, the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have

been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.g., Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing—particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO—is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges

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[10] To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. Johnson v. United States Department

findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra*, at 302. *See also University of Texas v. Camenisch*, 451 U.S. 390, 395 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services*, 105 S.Ct. 249 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect of the Board's non-approval of most of ASU's teacher education progams if left un-

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of Agriculture, 734 F.2d 774, 781 (11th Cir. 1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

> redressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be nonexistent.[11]

Given this finding by the lower court, which is entitled to substantial deference, *see Anderson v. City of Bessemer*, —— U.S. ——, 105 S.Ct. 1504 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court—and this Court on review—to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard the argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

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[11] The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted—that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimination, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.*, 769 F.2d 311 (5th Cir. 1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.

Analysis of Appropriat

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	Ala. Act No. 82-568 FY 1982-83		Ala. Act No. 83-753 FY 1983-84	
	Dollars	% of Sen. Inst. Total	Dollars	% of S Ins Tot
Alabama A & M	10,002,240	3.48	10,077,011	3.
Alabama State	8,524,347	2.96	8,702,976	2.
Athens State	1,980,646	0.69	2,025,676	0.
Auburn	44,861,189	15.59	45,449,983	15.
AES/CES	19,137,732	6.65	19,542,207	6.
AUM	7,312,868	2.54	7,414,534	2.
Jacksonville	12,376,421	4.30	12,626,227	4.
Livingston	4,145,116	1.44	4,218,680	1.
Troy	9,638,740	3.35	9,975,130	3.
UA	46,049,629	16.00	46,982,677	16.
UAB	69,676,355	24.22	70,701,053	24.
UAH	13,368,427	4.65	13,686,670	4.
Montevallo	6,475,129	2.25	6,617,048	2.
North Alabama	8,218,692	2.86	8,795,617	3.
South Alabama	25,972,713	9.02	26,112,352	8.
TOTAL	287,740,244	100.00	292,927,841	100.

* This figure does not include $1,000,000 appropriated to UAB for a Center for Biomedical Engineer Studie

ions from the Alabama Special Education Trust Fund
for 14 Senior Institutions
FY 1982-83 through FY 1986-87

	Ala. Act No. 84-330 FY 1984-85		Ala. Act No. 85-516 FY 1985-86		Ala. Act No. 86-622 FY 1986-87			
n.	Dollars	% of Sen. Inst. Total	Dollars	% of Sen. Inst. Total	Dollars	% of Sen. Inst. Total	5-Year % Increase	2-year % Increase
5	11,147,149	3.09	14,486,787	3.16	15,146,533	3.67	51.45	35.90
7	10,904,540	3.03	14,391,794	3.14	14,958,253	3.63	75.48	37.17
9	2,499,114	0.69	3,323,804	0.73	2,715,421	0.66	37.10	8.66
2	57,226,570	15.88	72,705,128	15.88	65,370,303	15.85	45.72	14.23
7	24,560,454	6.81	30,927,163	6.75	28,155,318	6.83	47.12	14.64
3	9,527,330	2.64	12,838,636	2.80	10,791,519	2.62	47.57	13.27
1	14,203,940	3.94	18,594,646	4.06	15,839,657	3.84	24.98	11.52
5	4,788,850	1.33	6,664,948	1.46	5,315,815	1.29	28.24	11.00
1	12,324,850	3.42	16,851,867	3.68	14,809,138	3.59	53.64	20.16
5	58,007,740	16.09	72,906,803	15.92	64,739,132	15.70	40.59	11.60
5	87,275,930	24.21	106,388,359*	23.24	97,162,640	23.57	39.45	11.33
7	17,678,240	4.90	23,145,365	5.06	20,626,723	5.00	54.29	16.68
5	7,953,573	2.21	10,382,210	2.27	8,751,972	2.12	35.16	10.04
0	10,716,180	2.97	13,976,061	3.05	12,030,259	2.92	46.38	12.26
1	31,619,690	8.79	40,287,129	8.80	35,889,052	8.71	38.18	13.50
0	360,434,150	100.00	457,870,700	100.00	412,303,735	100.00	43.29	14.39

o the Alabama Commission on Higher Education which was later transferred

DEFENDANT'S EXHIBIT UAS #1034

REPORT TO AUBURN UNIVERSITY, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JACKSONVILLE STATE UNIVERSITY, AND THE UNIVERSITY OF SOUTH ALABAMA

FACILITY MANAGEMENT INSTITUTE
A division of Herman Miller Research Corporation

REPORT TO AUBURN UNIVERSITY, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JACKSONVILLE STATE UNIVERSITY, AND THE UNIVERSITY SOUTH ALABAMA

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June 14, 1985

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Methodology for the review

In this review, there are two basic questions. First, which institutions of public higher education need to be evaluated? Second, how is the evaluation to be undertaken? This section will address these issues.

Institutions Reviewed

Alabama has fourteen public-supported higher education institutions offering baccalaureate degrees. They are:

Alabama A&M University
Alabama State University
Athens State College
Auburn University
Auburn University at Montgomery
Jacksonville State University
Livingston University
Troy State University
University of Alabama
University of Alabama at Birmingham
University of Alabama in Huntsville
University of Montevallo
University of North Alabama
University of South Alabama

In the original civil rights litigation brought by the United States government, all of the above institutions were defendants. However, the two predominantly black institutions, Alabama A&M University and Alabama State University, requested and received permission to join with the prosecution. Thus, from a legal standpoint, these two predominantly black institutions are in an adversarial position with the other institutions.

The basic problem is to identify the appropriate peer institutions to the predominantly black institutions for review purposes. Only in this way can the resulting study be valid.

There are seven institutions within the fourteen that constitute a valid comparative group. They are:

Alabama A&M University
Alabama State University
Auburn University at Montgomery
Jacksonville State University
Troy State University
University of Alabama in Huntsville
University of North Alabama

These institutions share: 1) a common governance and history as teachers colleges, or geographic proximity; 2) similar enrollment attributes in terms of total enrollment and graduate and undergraduate emphases; 3) similar programs and highest degree levels. The appropriateness of this grouping can be confirmed by referring to national classification systems and by examining key information about the institutions themselves. For further discussion on the selection of these institutions as a peer grouping, refer to Appendix A.

* * * *

SUMMARY AND CONCLUSIONS

The purpose of this study was to answer the question: Do vestiges of a dual system of higher education still remain in the State of Alabama in the area of facility resource allocation and management? To analyze this question, a five-part study was undertaken.

First, the state process—its workings, allocation, and projects—was reviewed. This portion of the study focused on the capital outlay process and the capital funding allocations from 1965 to 1981, and reviewed the project records of the Alabama Building Commission.

Second, using three "snapshots" from the years 1958, 1965-66, and 1968 an attempt was made to establish the level of facilities at each of these peer institutions.

Third, for the period of 1976 to 1982, a number of space categories at the seven peer institutions were compared. These space categories were classrooms, laboratories, offices, library and study space, general academic and administrative space, and nonresidential space.

Fourth, the campus visits permitted the reviewing team to assess the development strategy (which correlates with the earlier project review), the quality of maintenance, and the campus environment. Finally, an overall measure of facility quality and institutional competition is assessed for these institutions.

In the fifth section, the conclusions reached in the individual sections are summarized. The issue of the existence of vestiges of a dual system in the area of facility resource allocation and management is addressed.

The State Process: Its Workings, Allocations, and Projects—Conclusions

The review of the capital outlay process in the state of Alabama included the following statement on philosophy of operation:

> Insofar as the institutions of higher education are concerned, each has a board that is charged with managing the institution. The board therefore hires presidents and other officers and staff to carry out the work of the institution. Hence, the role of the state is simply to provide funds for these institutions and "get out of the way" so that the individual management can operate the institution in the most effective and appropriate way.

There are three important implications of this philosophy of operation:

First, each institution is required to manage its capital resources and capital development with minimal involvement by the state of Alabama. Thus, the state process can be regarded as a *non-intervention* type, leaving the institution free to move in whatever development or improvement direction it believes desirable at a particular time.

Second, the process neither rewards nor punishes. An institution's aggressiveness in fund raising does not lead to increased state capital funding. Thus, there is no reward for such activity. On the other hand, failure to expend money already allocated does not disqualify an institution from receiving its share of subsequent allocations. Thus, Alabama A&M continued to receive new allocations even though significant monies from earlier allocations remained unspent.

Third, it should be evident that the burden of management responsibility for virtually everything that occurs in the area of capital outlay rests with the institution. The institution is free to raise outside funds, maintain its facilities in whatever condition desired, and plan buildings to its own specifications. Thus, the responsibility for maintaining and developing facilities rests almost exclusively with the institution.

Capital Allocations

If one focuses on the five former teachers colleges contained in this peer group of seven institutions, it is evident that Alabama State University and Alabama A&M have benefited from the state capital allocations. In almost every measure, their allocations have surpassed those of their teacher-college colleagues.

Auburn University at Montgomery and the University of Alabama in Huntsville also did well in capital allocations. However, it must be remembered that Auburn University at Montgomery had no campus and no facilities at the start of this period and the University of Alabama in Huntsville had only limited facilities in place at that time. Thus, the dollars allocated for these institutions included the extensive "start-up" costs necessary to establish an institution.

Since Alabama A&M and Alabama State University had well-developed physical plants in 1965, the additional capital allocations over this period (1965-1981) should have given these traditionally black institutions a distinct advantage over their proximate colleagues.

Projects

Working solely with the project records published by the Alabama Building Commission, a number of interesting observations can be made.

First, it is possible to infer a development strategy for each of these institutions. It appears from this project record that Alabama A&M University, Auburn University at Montgomery, and the University of Alabama in Huntsville all rely on new construction as the driving force of their development programs. This is understandable at Auburn University at Montgomery and at the University of Alabama in Huntsville. It is not so easily understood at Alabama A&M University because of the extensive physical plant developed prior to 1965.

Jacksonville State University, Alabama State University, and the University of North Alabama all emphasize a combination of new construction and renovation. While the precise balance between these two dimensions varies from one institution to another, it represents a middle of the road position.

The project record shows that Troy State uses state monies for many relatively minor capital projects, in addition to major renovation and new construction.

Jacksonville State University is notable among the seven institutions for its use of non-APSCA funding. It is evident from the project record that the library, business administration building, nursing building, and new physical education facility were all constructed with non-APSCA funds.

Three Historic Snapshots

Three historic snapshots were used to describe the facility picture during the earlier years of this time period.

The first of these "snapshots" was taken from a report issued in 1958 by the Alabama Education Study Commission. The report provides information on the utilization of classroom and laboratory facilities as well as information on the extent of and need for replacement of both nonresidential facilities and the residential facilities.

In 1968 the Alabama Education Study Commission issued another report dealing with the decade ahead. The capital needs for each institution for the next decade are reported. The projection of needs is based on work done at the institution plus testimony from the president.

The 1965-66 records of the state insurance fund were reviewed to note the value of the academic plant insured by each institution at that time. Since the institution pays a premium for all the buildings insured there is no reason to overstate the value of the buildings. Because this same fund provides the dollars necessary to replace buildings

lost by fire or damaged, there is an incentive to accurately report replacement value.

The above three snapshots constitute interesting glimpses of the facilities situation in Alabama during this decade. While these snapshots do not provide conclusive evidence of faculty equivalence among the seven institutions, they strongly suggest that such a facility equivalence was indeed the case.

1976-82 Space Comparisons

These comparisons were made on classrooms, laboratories, offices, library and study space, general academic and administrative space (a summary of the first four categories), and total nonresidential space.

While all seven campuses have the capacity to serve more students than they presently do, Alabama State University and Alabama A&M University still compare favorably to the other institutions in these measures. No sense of facility gap or deprivation exists for either of these institutions.

The Institutional Review

Campus Visitation

The institutions were judged on the basis of: development strategy, maintenance and custodial care, overall campus environment, and a total competitive assessment.

Development Strategy

Generally, the conclusions reached through a review of the project record were confirmed through the campus visits.

Alabama A&M University does indeed emphasize new construction, often neglecting the renovation and renewal of its older facilities.

The University of North Alabama, Alabama State University, and Troy State University all use new construction and renovation or renewal to develop their institutions.

Jacksonville State University has been the most successful of these institutions in securing outside funding. Yet facility problems exist. The imposing new structures constructed at Jacksonville State are not consistently well planned and well located.

As new institutions, Auburn University at Mongomery and the University of Alabama in Huntsville constructed new facilities and also pursued an incremental development strategy. In each case, expansion of the physical plant kept pace with enrollment growth. However, the University of Alabama in Huntsville has apparently departed from that sound strategy with its most recent new facility.

Maintenance and Custodial Care

Alabama State University, the University of North Alabama, the University of Alabama in Huntsville, Auburn University at Montgomery, Jacksonville State University, and Troy State University all have good programs of maintenance and custodial care that are essentially equivalent. Differences observed in the programs can be explained by the timing of the visit rather than by the quality of these services.

However, the situation at Alabama A&M University presents a special case. Maintenance and custodial care are not performed equally throughout the campus. Thus, some structures seem well cared for while others seem neglected.

Campus Environment

While Alabama State University, Troy State University, and the University of North Alabama all have unique

features, the campus environment at each of these institutions presents a compact, collegiate atmosphere. In all three cases, the campuses are pedestrian oriented and pleasant places to be. However, Alabama State University and the University of North Alabama would face problems in expanding their campuses due to the lack of available land.

Alabama A&M, when viewed from a distance, is the most impressive of the seven campuses. A closer look reveals a variety of problems. The effect of both the maintenance problems and development strategy is evident in the apparent existence of two levels of quality among the buildings. The near derelict Domestic Science Building, the vacant Councill Hall, and the need for improved roads all help to create a campus environment far below its potential.

Jacksonville State University is divided by a major highway. This difficulty is further complicated by the development strategy followed by the institution. As a result, the campus does not function as well as others.

Auburn University at Montgomery looks like the commuter institution of higher education that it is. The grounds and buildings are well designed but the overall result is quite impersonal.

The University of Alabama in Huntsville, with its sprawling campus, is in some respects, oriented more to the automobile than to the pedestrian.

Facilities and Institutional Competition

It is judged that the facilities of the following institutions are "competitively effective": Alabama State University, Auburn University at Montgomery, Jacksonville State University, Troy State University, the University of Alabama in Huntsville, and the University of North Alabama.

The problem at Alabama A&M University seems to be in its ability to manage facilities. If the class assignment

practices witnessed during the visit to the campus are typical, this alone would place Alabama A&M University at a disadvantage. Further, the tendency to build comprehensive new facilities while neglecting needed renewal and renovation poses problems. Finally, the uneven level of maintenance exacerbates the other problems.

Surprisingly, Alabama A&M still has substantial unexpended funds available at APSCA—some of it dating back to the 1973 allocations. As of spring 1984, the 1981 oil windfall money was unspent. Thus, while the facility situation at Alabama A&M is troublesome, it must be attributed to the facility management policies and practices of the institution itself.

Conclusion

This investigation clearly establishes the conclusion that no vestige of a dual system of higher education exists in the State of Alabama in the area of facility resource allocation and management. Where problems exist on any campus, they are the result of the facility management practices of the institution and not the result of the state process.

Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1878

IN THE

Supreme Court Of The United States

October Term, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY; ALABAMA STATE BOARD OF EDUCATION; and GEORGE WALLACE, GOVERNOR OF ALABAMA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT AUBURN UNIVERSITY

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111 pgs.

QUESTIONS PRESENTED

1. Do the issues of fact and law in this case justify a grant of certiorari prior to a decision by the court of appeals?

2. Does the district court's decision have "sufficient indicia of finality" so as to be appealable under 28 U.S.C. § 1291?

3. Does the district court's decision requiring the submission of a plan to eliminate the alleged vestiges of segregation in Alabama's public colleges and universities so specify the nature or extent of the relief which the plan would afford as to make the decision appealable under 28 U.S.C. § 1292 (a) (1) ?

4. Was it appropriate for the court of appeals to stay proceedings relative to the adequacy of the desegregation plans submitted by the Governor of Alabama, the Alabama Public School and College Authority and the Alabama Commission on Higher Education?

PARTIES

The petitioners are Alabama State University ("ASU"), Alabama A&M University ("A&M"),[1] the Knight-Intervenors[2] and the "Normalite Association."[3] The United States, the lead plaintiff in the district court, has not joined in the Petition for Writ of Certiorari.

Auburn University and its Board of Trustees ("Auburn"), the other public institutions of higher education in Alabama and their respective Boards of Trustees and several Alabama education authorities were defendants below.[4]

---

[1]Contrary to their assertion that they make claims on behalf of their students, Alabama State University ("ASU") and Alabama A&M University ("A&M") sought and were granted realignment as plaintiffs in the district court on the basis that they, as state institutions, had rights that had been violated by the defendants. *See* Appendix pp. A-1-A-6, A-7-A-8. The United States Court of Appeals for the Eleventh Circuit has held in a related appeal that state institutions of higher education do not have the rights claimed by A&M and ASU as the basis for their realignment. *See United States v. State of Alabama,* Slip Op. 85-7582 (11th Cir. June 6, 1986) at _____. (Appendix pp. A-82-A-83).

[2]The Knight-Intervenors are a class represented by students, alumni, faculty and administrators of ASU, certified as consisting of graduates of ASU and black citizens of Alabama who are eligible for employment by or who attend or may attend public institutions of higher education in the Montgomery, Alabama area. Their claims are expressly restricted to the desegregation of public higher education in Montgomery, Alabama. The petition for certiorari incorrectly implies that the class asserted statewide claims. *See* Appendix A-11-A-13.

[3]The Normalite Association is an A&M alumni group, which sought intervention for the stated purpose of maintaining A&M's "identity as a predominantly black institution." *See* Appendix pp. A-16-A-17. Only limited intervention, to comment on any desegregation plan presented, was granted. The petition for certiorari incorrectly characterizes the extent and nature of this intervention. *See* Appendix pp. A-20-21.

[4]The defendants below included the other public institutions of higher education in Alabama: The University of Alabama, Jacksonville State University, the University of North Alabama, Troy State University, the University of South Alabama, Livingston University and the University of Montevallo; the State of Alabama, its Governor, the Alabama State Board of Education, the Alabama Public School and College Authority ("APSCA"), and the Alabama Commission on Higher Education ("ACHE"). Claims were also asserted with reference to Auburn University in Montgomery ("AUM"), the University of Alabama in Huntsville ("UAH") and the University of Alabama in Birmingham ("UAB").

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STATEMENT OF THE CASE

The plaintiffs allege that the State of Alabama, its Governor, three of its agencies and a number of independently governed public institutions of higher education have failed to eliminate the vestiges of segregation by (1) failing to enhance two predominantly black institutions to make them equal in status to Auburn University and the University of Alabama, the two major research and doctoral level institutions of higher education in the state;[5] (2) failing to achieve a particular racial balance in faculty and enrollment of various institutions; and (3) creating and operating branch campuses of Auburn University and the University of Alabama in the same cities as Alabama A&M University and Alabama State University, respectively.

The Complaint, filed by the United States on July 11, 1983, alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education found that the State of Alabama was in violation of Title VI because of an alleged failure to eliminate the vestiges of a formerly racially dual system of higher education.[6]

---

[5]The evidence was that in terms of capital resources, finances for operations and academic program offerings, A&M and ASU were treated as well as or better than Jacksonville State University, the University of North Alabama, Troy State University, Livingston University, the University of Montevallo and AUM, which are the other state-supported institutions of higher education with degree levels and enrollment similar to those of ASU and A&M.

[6]Specifically, the Complaint alleges that "prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education." The Complaint alleges that the enrollment, faculty and staff and governing boards of each of the institutions of higher education are still identifiable by race and that in Montgomery, Alabama and Huntsville, Alabama the existence of AUM and UAH, in close proximity to ASU and A&M, respectively, impedes the ability of those traditionally black institutions to desegregate. Finally, the Complaint alleges that the State has discriminated in favor of Auburn and against A&M by selecting Auburn, and not A&M, to be the recipient of the bulk of the State's share of federal financial assistance for agricultural research and instruction.

There was no allegation in the Complaint, nor any evidence at trial, that any of the defendant institutions of higher education had denied admission to any student on the basis of race since 1967. Two of the institutions of higher education, the University of South Alabama and Auburn University at Montgomery ("AUM"),[7] were created in 1963 and 1967, respectively, and have never been racially restricted in any respect. The creation of AUM was sanctioned in *Alabama State Teachers Assn. v. Alabama Public School and College Authority*, 289 F. Supp. 784, *aff'd*, 393 U.S. 400 (1969), when this Court affirmed a three-judge court's rejection of the claims of a group of plaintiffs affiliated with ASU that the creation and operation of AUM would impede the desegregation of ASU.

After two years of intensive discovery and other pretrial matters, the trial on the merits began on July 1 and concluded on August 2, 1985. The reporters' transcript is 8,042 pages in length, and over 1,700 exhibits were introduced. Contrary to the petitioners' assertions, evidence was presented on remedial questions; including the issue of restricting AUM's institutional mission and program offerings, allegedly for the purpose of facilitating the desegregation of ASU; the feasibility of fragmenting Alabama's Agricultural Experiment Station and Cooperative Extension Service; the alleged need for additional State funding of A&M and ASU in order to enhance their attractiveness to white students; and the possible ingredients of plans to eliminate the vestiges of segregation in higher education.

On December 9, 1985, the district court entered a 99-page order and opinion that identified each vestige of segregation it found to exist in Alabama's colleges and ordered that the Governor, the Alabama Public School and College Authority ("APSCA") and the Alabama Commission on Higher Education ("ACHE") submit a plan to eliminate each vestige by enhancing the predominantly black institutions and diverting resources from the other institutions.[8]

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[7]AUM currently has an 18% black enrollment.

[8]The district court decision identifies with specificity the conditions and practices that allegedly offend the Constitution and states why each

Auburn University[9] and the University of Alabama filed notices of appeal on February 5, 1986. On February 7, 1986, Auburn moved in the district court for a stay of further proceedings, and upon failure of the district court to act on the motion, motions for a stay were filed in the court of appeals on February 13, 1986. The court of appeals issued orders staying proceedings in the district court on February 14, 1986, the date scheduled for the submission of a plan in accordance with the district court's decision. However, notice of the stay reached the parties after one plan had been filed by the Governor and APSCA and another by ACHE. Each of the petitioners filed motions in the court of appeals to dissolve the stay and to dismiss the appeals on the grounds asserted in their Petition for Writ of Certiorari in this Court.[10] The motions to dismiss the appeals have not yet been ruled upon by the court of appeals, but the motions to dissolve the stay have been denied.[11]

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is offensive. The district court made at least eight findings with respect to vestiges that affect Auburn and AUM, including: (1) that the Alabama Constitution's provisions for governance of Auburn University and the University of Alabama by independent Boards of Trustees are vestiges of segregation; (2) that the assignment of responsibility to Auburn, and not A&M, to manage and operate Alabama's Agricultural Experiment Station and Cooperative Extension Service is unconstitutional; (3) that Auburn's use of the American College Testing Program's ACT test as an admissions criterion is unconstitutional; (4) that Auburn does not actively recruit blacks for faculty positions; (5) that there is needless duplication of education and business programs offered by AUM and ASU that unconstitutionally impedes the desegregation of ASU; (6) that the races of the chief executive officers of Alabama public institutions of higher education are vestiges of segregation; (7) that Alabama's choice of resource allocation for facilities from 1965 to 1983 failed to enable ASU and A&M to attract white students; and (8) that Alabama's allocation of financial resources for the operation of its state universities has caused A&M's and ASU's student bodies to remain segregated.

[9]*See* Appendix p. A-22.

[10]The United States did not object to the stay orders issued by the court of appeals, and it has not moved to dismiss the appeals.

[11]In August, 1985, after the conclusion of the trial but before the entry of the opinion and order on the merits, the district court entered an order enjoining the State Board of Education from refusing to certify ASU's teacher education programs because of ASU's failure to comply with State Board of Education regulations concerning accreditation and certifi-

SUMMARY OF ARGUMENT

The petitioners' request for writ of certiorari should be denied because: (1) the facts and circumstances of this case do not warrant a grant of a writ of certiorari before judgment in the court of appeals; (2) the district court's decision has "sufficient indicia of finality" to render it appealable under 28 U.S.C. § 1291; (3) the district court's order that the Governor, ACHE and APSCA prepare a plan consistent with its opinion specifies the scope of relief sufficiently to render it appealable as an injunction under 28 U.S.C. § 1292(a)(1); and (4) the court of appeals' stay of proceedings in the district court is justified by the respondents' likelihood of success on the merits, the danger of irreparable harm to the respondents, the public interest and the absence of any danger of irreparable harm to the petitioners.

ARGUMENT

I. The Petition For A Writ of Certiorari Is Premature.

Petitioners have requested a grant of certiorari pursuant to 28 U.S.C. § 1254(1), which provides that "[c]ases in the court of appeals may be reviewed by the Supreme Court . . . by writ of certiorari granted upon the petition of any party . . . before or after rendition of judgment or decree . . . ." However, certiorari is rarely granted prior to judgment in the court of appeals and

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cation. That injunction has been reviewed by the court of appeals in a separate appeal, Case No. 85-7582. That appeal shares at least one issue common to the present case, whether a state university is endowed with substantive rights under Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment. The court of appeals held in Case No. 85-7582 that ASU does not have such rights and reversed the trial court's decision as to ASU and its Board of Trustees. *See* Appendix pp. A-79-A-92. Although the court of appeals left the injunction intact as to the Knight Intervenors, it did so on the grounds that the State Board of Education had not challenged the standing of the Knight Intervenors on appeal, *see* Appendix at A-81, 86, and that the injunction was necessary to maintain the status quo "so as to preserve the court's ability to render a meaningful decision on the merits." *See* Appendix at A-91.

this Court's rules of procedure provide that certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellant practice and to require immediate settlement in this Court." Sup. Ct. R. 18. Cases involving conflicts between the executive and judicial branches of the federal government, *United States v. Nixon*, 418 U.S. 683 (1974); conflicts between the United States or its citizens and foreign governments, *see Wilson v. Girard*, 354 U.S. 524 (1957); and other cases of *urgent, national* importance, *see, e.g., United States v. United Mine Workers*, 330 U.S. 258 (1947), and *Carter v. Carter Coal Company*, 298 U.S. 238 (1936), have been held to justify review by this Court prior to judgment in the court of appeals.

The case under consideration is of great importance, but there is no imminent, irreparable threat to the national government or to individual constitutional rights as to require *immediate* review by this Court. This is not a case where the governing legal principles have been clearly defined in this Court. Although the issue is stated to be desegregation, it actually involves the question of long-term enhancement to institutions, not the assignment of students. The evidence at trial was undisputed that no defendant institution has denied admission to any person on the basis of race since 1967, and that over 60% of the black students who attend public colleges in Alabama attend the defendant institutions. This case involves the alleged constitutional rights of State institutions of higher education, not of students.

The number of issues and the size of the record compel review by the court of appeals prior to review by this Court. Auburn's assignments of error as to the district court's decision include: (1) whether the district court erred in assigning responsibility for the development of a desegregation plan for Auburn to an entity other than Auburn's Board of Trustees, which has sole authority for its management and control under the Alabama Constitution of 1901 and Ala. Code § 16-48-2 (1975); (2) whether *Alabama State Teachers Association v.*

Alabama Public School and College Authority, 289 F.Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969), is *res judicata* as to the constitutionality of the establishment and operation of AUM; (3) whether A&M and ASU, which are instrumentalities of the State of Alabama, may invoke the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964 against the State; (4) whether the Knight Intervenors or the United States may invoke such rights on behalf of A&M and ASU; (5) whether the Office for Civil Rights of the United States Department of Education followed its own operating procedures in conducting its 1978 higher education investigation, which was a prerequisite to the filing of this action by the United States; (6) whether the district court had jurisdiction to entertain claims relating to State agricultural research and extension agencies that receive federal financial assistance administered by the United States Department of Agriculture, which has not made any finding of violation of Title VI of the Civil Rights Act of 1964 with respect to those agencies; (7) whether the district court erred in finding that the defendants had violated Title VI of the Civil Rights Act of 1964 in the absence of violations in any specific institution or in specific programs receiving federal financial assistance; (8) whether the district court clearly erred in finding that Auburn's use of the ACT test as an admissions criterion violated the Constitution; (9) whether the trial court erred in holding that A&M and ASU had been discriminated against in the allocation of financial resources by comparing those institutions to Auburn University and the University of Alabama rather than to State institutions of similar size and mission; (10) whether the trial court clearly erred in holding that governance of Auburn University and the University of Alabama was provided for in the Alabama Constitution of 1901 for racially discriminatory reasons, and (11) whether the district judge should have been disqualified on the grounds of bias and extrajudicial knowledge of disputed evidentiary facts.

II. The Decision Of The District Court Is Appealable Pursuant to 28 U.S.C. § 1291.

The petitioners' argument that the district court's decision is not final assumes, without analysis, its conclusion — that the district court's decision "does no more than find liability." In fact, the decision from which Auburn appeals does far more than merely find liability; it decides everything except the details of implementing its decision.

The district court's order effectively ends Auburn's participation in the litigation as a matter of right by limiting Auburn's involvement to comment on a plan submitted by others. In contravention of settled precedent from this Court, *e.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974), and *Brown v. Board of Education*, 349 U.S. 294 (1955), and in disregard of the Alabama Constitution, the district court assigned the responsibility for the development of a desegregation plan for Auburn to the Governor, ACHE and APSCA rather than to the Auburn University Board of Trustees. Under Article XIV, § 266 and Amendment 161, *Alabama Constitution* (1901), the management and control of Auburn University are vested exclusively in its Board of Trustees. The Alabama Supreme Court has held that the management and control of Auburn University and the University of Alabama are beyond the authority of ACHE, a creature of the Legislature, and by extension APSCA and the Governor,[12] because of the Alabama constitutional provisions for autonomous boards of trustees at those universities. *Opinion of the Justices*, 417 So. 2d 946 (Ala. 1982).

The district court's findings leave little doubt that the court intends to restructure the Alabama Legislature's designations

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[12]APSCA, also a statutory entity, is a public corporation the sole function of which is to issue bonds to finance capital outlay needs. It has no powers of governance of public higher education. Ala. Code, §§ 16-16-1, *et seq.* (1975).

The Governor and the State Superintendent of Education are *ex officio* members of Auburn's Board of Trustees. There are ten other trustees, each of whom serves for a 12-year term. Amendment 161, *Alabama Constitution* (1901). Except as one of twelve trustees, the Governor has no authority to manage Auburn.

of responsibility for agricultural research and extension, to direct funds for those activities away from Auburn and toward A&M and to abolish Auburn's requirement of a minimum score on the ACT test for unconditional admission as an entering freshman. Its finding that specific academic programs at AUM and UAH unnecessarily duplicate allegedly similar programs at ASU and A&M, respectively, and have a "negative impact" on white enrollment at the predominantly black institutions leaves little question as to the future of those programs at UAH and AUM.

The district court order so restricted the discretion of those ordered to submit a plan to remove the vestiges of segregation that it reduced the submission of the plan to a ministerial task. The district court found that vestiges existed in every area alleged by any plaintiff and granted the relief requested by the petitioners when it indicated that the remedy for these vestiges must be the enhancement of A&M and ASU to the detriment of other state-supported institutions.[13] Assuming that the district court allowed the Governor, APSCA and ACHE some flexibility in determining how this enhancement would be effected, that flexibility does not make the decision unappealable under 28 U.S.C. § 1291. *See Brown Shoe Company, Inc. v. United States,* 370 U.S. 294 (1962); *Morales v. Turman,* 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds,* 430 U.S. 322 (1977) (affirming on the issue of appealability); *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975); *Thoms v. Heffernan,* 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds,* 418 U.S. 908 (1974).[14]

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[13]The racial identity of A&M and ASU as black colleges was the primary vestige of segregation relied upon in the presentation of the plaintiffs' case. Paradoxically, the district court ordered enhancement of these institutions without any provision for racially integrating them. Thus, the district court order keeps them separate but strives to make them more than equal to the other institutions.

[14]That the district court did not intend its decision to be appealable is not conclusive of this issue. *Compare United States v. Brown Shoe Co.,* 179 F. Supp. 721, 742 (E.D. Mo. 1959) *with Brown Shoe Co. v. United*

III. The Decision Of The District Court Is Appealable Pursuant to 28 U.S.C. § 1292(a)(1).

If the decision of the district court were deemed not to have "sufficient indicia of finality" to render it appealable under 28 U.S.C. § 1291, it nevertheless specifies the nature and extent of the relief to be afforded by an acceptable plan so as to be an interlocutory and mandatory injunction appealable under 28 U.S.C. § 1292(a)(1).

In *Board of Public Instruction v. Braxton*, 326 F.2d 616 (5th Cir. 1964), the United States Court of Appeals for the Fifth Circuit held that the order of the United States District Court for the Middle District of Florida requiring a county school board to submit a plan designed to eliminate segregation in the county's schools was a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1) because it ordered that the plan submitted provide for the elimination of five specific practices the district court found to be unconstitutional. *See* 326 F.2d at 617, n.1, 619. The order of the court below was no less specific when it ordered that the plan submitted eliminate all vestiges of the prior dual system of higher education in Alabama, consistent with the findings in, and inferences from, its 99-page opinion. "[T]he ordering of the plan dealing expressly with these prohibited acts amounts to a mandatory injunction" appealable pursuant to 28 U.S.C. § 1292(a)(1). *Braxton*, 326 F.2d at 619. *See also Morales v. Turman*, 535 F.2d 864, 867, n.6 (5th Cir. 1976), *rev'd on other grounds*, 430 U.S. 322 (1977).[15]

States, 370 U.S. 294, 308 (1962); *see also United States v. Western Electric*, 777 F.2d 23, 28 (D.C. Cir. 1985) (noting that decision of district court in *Morales v. Turman* "purports to be nonfinal.").

[15]The cases cited by the petitioners are in accord with the Fifth Circuit's decisions in *Braxton* and *Morales*. *See Spates v. Manson*, 619 F.2d 204, 209-210 (2d Cir. 1980) (although purporting to express no opinion as to the validity of *Braxton*, the court recognized that an order is appealable "when the content of the plan to be submitted has already been substantially prescribed by the district court"); *Hoots v. Commonwealth*, 587 F.2d 1340, 1349-1350 (3d Cir. 1978); *Frederick L. v. Thomas*, 557 F.2d 373, 380-81 (3d Cir. 1977). In *United States v. Western Electric*,

IV. The Court Of Appeals' Stay Of Proceedings In the District Court Is Appropriate.

The petitioners' argument that the court of appeals' stay of proceedings in the district court was improvidently granted is based upon an assertion that school desegregation cases present a special situation in which stays may never be granted.[16] In support of this proposition, petitioners cite several cases which either dissolve or deny stays because, under the particular circumstances of those cases, the movant for the stay failed to satisfy the requirements of demonstrating a substantial case on the merits and showing that the balance of the equities weighs heavily in favor of granting the stay. *See Ruiz v. Estelle,* 650 F.2d 555 (5th Cir. 1981); *cert. denied,* 460 U.S. 1042 (1981). The cases cited by petitioners deny or dissolve the stays in question for a variety of reasons, none of which is that stays are necessarily inappropriate in school desegregation cases.

Stays have, in fact, been approved by this court in school desegregation cases. In *Corpus Christi School District v. Cisneros,* 404 U.S. 1211 (1971) (Black, J., Circuit Justice), Justice Black reinstated a stay granted by the district court, which had been dissolved by the Fifth Circuit Court of Appeals, in part on the ground that the merits of the case presented questions which had not theretofore been passed on by the Supreme Court or the United States Court of Appeals for the Fifth Circuit. In *Columbus Board of Education v. Penick,* 439 U.S. 1348 (1978) (Rehnquist, J., Circuit Justice), Justice Rehnquist granted a stay on the grounds that the court of appeals

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777 F2d 23 (D.C. Cir. 1985), the District of Columbia Circuit distinguished *Morales,* on the ground that the order before it disposed of no issues in the case and did not demonstrate "that the district court has made up its mind." 777 F.2d at 28. The decision of the district court in the case at bar clearly demonstrates that the district court has "made up its mind." Formulation of the administrative details for the implementation of the decision would add little or nothing to the definition of the issues on appeal. *See Frederick L.,* 557 F.2d at 380-81.

[16]If there is jurisdiction of Auburn's appeal under 28 U.S.C. § 1291, a stay order is unnecessary because the notice of appeal automatically divested the district court of jurisdiction.

had misinterpreted an earlier opinion of the Supreme Court and that, because of the drastic and wide-ranging relief ordered, the balance of the equities favored a stay.

The district court's decision here would force drastic changes in the academic policies, programs and reputation of Auburn and the other respondents. The threat of these changes as well as the district court's unsupported rhetoric regarding black student participation in campus life at Auburn and Auburn's racial attitudes seriously handicap ongoing efforts to recruit qualified black students and faculty members. Once these potential students or faculty members have chosen another institution, they may be lost to Auburn forever. The district court's findings relative to the racially discriminatory intent behind Auburn's constitutional independence from the Alabama Legislature could seriously erode the ability of Auburn's Board of Trustees to conduct business, manage academic affairs and direct educational policy.

The district court's decision has caused irreparable harm to Auburn because of the fears of current and prospective students that the institution in which they matriculate may not be the same institution from which they graduate. The difficulty of returning an organization ordered to be altered drastically to its former status has been considered an important factor in determining whether a stay pending appeal should be granted. *See, e.g., Columbus Board of Education v. Penick,* 439 U.S. 1348 (1978) (Rehnquist, J., Circuit Justice); *International Boxing Club v. United States,* 2 L.Ed. 2d 15, 78 S.Ct. 4 (1957) (Harlan, J., Circuit Justice); *cf. United States v. First National City Bank,* 386 U.S. 361, 370-71 (1967) (construing stay provision of Bank Merger Act of 1966, 12 U.S.C. § 1828 (c) (7) (A)). Preservation of the status quo pending appeal will not harm the plaintiffs or the public interest in the event the district court's decision is affirmed. Review prior to the initiation of expensive discovery and hearings concerning the elements of a plan to implement the district court's decision might avoid the expenditure of public funds on unnecessary litigation. The balance of the equities clearly favors a stay.

An important factor in determining the propriety of the stay, Auburn's likelihood of success on the merits, was extensively briefed in the court of appeals in support of its motion to stay. *See* Appendix pp. A-45 *et. seq.* Petitioners, however, are completely silent on this point. As demonstrated in the stay petition, the district court's opinion is fundamentally erroneous, and a stay of the order pending appeal is appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	CASE NO. CV-83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia,* that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama

State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,
GRAY, SEAY & LANGFORD
By: /s/ SOLOMON S. SEAY, JR.

Solomon S. Seay, Jr.
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(205) 269-2563
Attorney for Board of Trustees
for Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of the same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

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The State of Alabama
The Alabama Public School and College Authority

Glenn Powell
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and
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FOR: The University of Alabama

Charles Coody
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FOR: Wayne Teague
Alabama State Board of Education

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EXHIBIT 1

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

Agenda Item # 6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CASE NO.
	)	CV 83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants	)	

MOTION TO REALIGN OR IN THE ALTERNATIVE
FOR LEAVE TO FILE CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability

of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq*. In addition to the relief requested herein and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

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& WHATLEY
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(205) 933-0300

By /s/ JOE R. WHATLEY, JR.

Joe R. Whatley, Jr.

/s/ DONALD W. STEWART

Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this 25th day of July, 1983:

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/s/ JOE R. WHATLEY, JR.

Joe R. Whatley, Jr.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	CV 83-C-1676-S
	)	
THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; THE BOARD OF TRUSTEES FOR ALABAMA A&M UNIVERSITY, a public corporation; AUBURN UNIVERSITY, a public corporation; JACKSONVILLE STATE UNIVERSITY, a public corporation; LIVINGSTON UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE UNIVERSITY OF MONTEVALLO, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; a public corporation; THE UNIVERSITY OF NORTH ALABAMA, a public corporation; THE UNIVERSITY OF SOUTH ALABAMA, a public corporation; THE ALABAMA COMMISSION ON HIGHER EDUCATION; and THE ALABAMA	)	

PUBLIC SCHOOL AND COLLEGE)
AUTHORITY,)
)
Defendants.)

MOTION TO INTERVENE

John F. Knight, Jr., Catherine Coleman, Charles R. Anderson, John T. Gibson, Alma S. Freeman, through their undersigned counsel, pursuant to Rule 24, Fed.R.Civ.P., move to intervene in this action as parties plaintiff, on behalf of themselves and on behalf of the class they purport to represent. As grounds for their motion, Petitioners would show as follows:

1. Petitioners are the named plaintiffs in the civil action pending in the United States District Court for the Middle District of Alabama styled *Knight v. Wallace,* Civil Action No. 82-52-N (M.D.Ala.). Said action challenges the failure of the State of Alabama to eliminate the vestiges of prior *de jure* racial segregation in the four-year institutions of higher learning in Montgomery, Alabama. The Complaint in *Knight v. Wallace* is substantially the same as the proposed intervenors' complaint attached to this motion.

2. All of the defendants in *Knight v. Wallace* are, in their official capacities, defendants in the instant action as well. They are the Governor of the State of Alabama, the State Superintendent of Education, the members of the Board of Trustees for Alabama State University, the members of the Board of Trustees for Auburn University, the members of the Board of Trustees for Troy State University, the members of the Alabama Commission on Higher Education and the members of the Alabama Public School and College Authority.

3. The allegations of fact and law and the prayer for relief made by the Attorney General of the United States in the instant action are substantially the same as those set out in the amended complaint in *Knight v. Wallace,* as regards the institutions of higher education in Montgomery.

4. Petitioners for intervention have interests relating to the property or transaction which is the subject of this action and are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect their interests. In the instant action, the United States seeks an injunction requiring the defendants to disestablish on a statewide basis the racial segregation that exists in higher education and to develop, submit and implement detailed plans for eliminating all vestiges of the dual system in all the institutions of higher education in Alabama, including Alabama State University, Auburn University Montgomery and Troy State University Montgomery. Since Petitioners are seeking substantially the same relief regarding the Montgomery institutions in *Knight v. Wallace,* disposition of the instant action will clearly, as a practical matter, control the outcome of the controversy at issue in *Knight v. Wallace.*

5. In the alternative, Petitioners should be permitted to intervene in the instant action under Rule 24 (b) , because Petitioners' claims as set out in *Knight v. Wallace* have questions of law and fact in common with those presented in the instant action.

6. Petitioners' interests are not adequately represented by the existing parties in this action.

7. The requested intervention will not unduly delay or prejudice the adjudication of the rights of the original parties in this action.

WHEREFORE, Petitioners pray that the Court, upon due consideration, will enter an order as follows:

A. Granting their motion to intervene in this action as party plaintiffs; and,

B. Joining as defendants and ordering served with process, in their official capacities, the members of the Boards of Trustees for Alabama State University, Auburn University, and Troy State University, and the members of the Alabama Commission on Higher Education and the Alabama Public School and College Authority.

Respectfully submitted this 14th day of September, 1983.

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By: /s/ J. U. BLACKSHER
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and,

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Harvey L. Handley, III, Esq.
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by depositing same in the United States mail, postage prepaid.

/s/ J. U. BLACKSHER

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NUMBER:
	)	
THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; THE BOARD OF TRUSTEES FOR ALABAMA A&M UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY, a public corporation; AUBURN UNIVERSITY, a public corporation; JACKSONVILLE STATE UNIVERSITY, a public corporation; LIVINGSTON UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE UNIVERSITY OF MONTEVALLO, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation; THE UNIVERSITY OF NORTH ALABAMA, a public corporation; THE UNIVERSITY OF SOUTH ALABAMA, a public corporation; THE ALABAMA COM-	)	CV 83 C 1676 S

MISSION ON HIGHER EDUCATION; and THE ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY,

Defendants.

MOTION TO INTERVENE

Pursuant to Rule 24(a) and 24(b), Federal Rules of Civil Procedure, the University Legal Defense Fund (hereinafter referred to as ULDF), and the National Alumni Normalite Association (hereinafter referred to as NANA), move the instant Court to allow them to intervene as party defendants for the following reasons: however, in the event that defendant Alabama A&M University's Motion to be Realigned as a Plaintiff is granted, then in said event, the said moving parties request to intervene as Plaintiffs.

1. ULDF is an incorporated non-profit organization dedicated to the progress and preservation of Alabama A&M University and other predominantly Black institutions in the State of Alabama. Presently, the primary focus of the organization is upon Alabama A&M University. ULDF is completely supported by contributions. Though ULDF works closely with the administrators and officials of the said A&M, no portions of ULDF's programs rely upon funds from this or any other institution. ULDF seeks, inter alia, to secure financial compensation for Alabama A&M as a result of past years of discrimination in funding, and to insure that Alabama A&M maintains its identity as a predominantly Black institution, while at the same time making its resources available to all qualified persons without regard to race, color or creed. Membership in the organization is open to any person or organization who supports and is willing to work to attain the objectives and purposes of the said organization.

2. NANA is a non-profit organization founded in 1940, and acquired a full-time office on the campus of Alabama A&M

in 1970. The president of the organization is Dr. Taylor Byrd. NANA represents over thirty thousand (30,000) Alabama A&M graduates. The said organization is open to all graduates, former students, and those currently enrolled as undergraduates. NANA has an executive board comprised of thirty-three (33) people, thirty (30) are elected by the National Body itself, and three (3) are appointed by NANA's president. The objectives of NANA are congruent to those espoused by ULDF as previously outlined in paragraph 1 above.

3. The Complaint states, inter alia, that the institutions of the Alabama system of public higher education are largely segregated by race, and are racially discriminatory in their practices and policies of admission, faculty hiring and assignment, and in their provisions of facilities, resources, curricular, extra-curricular programs and activities. The Complaint requests an order enjoining the defendants from maintaining and perpetrating racial dualism in the State supported system of higher education in Alabama, and that the defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education within the State.

4. The allegations and relief requested as stated in paragraph 3 above have a direct bearing on the vested interest of ULDF and NANA as pertain to their objectives and interest in Alabama A&M as outlined in paragraphs 1 and 2 above. Though several Defendants were named in the Complaint in question, including the board of trustees for Alabama A&M University, none of the said Defendants could adequately represent the moving parties, ULDF and NANA. The objectives and interest of the two moving parties would be greatly impaired if they are not permitted to intervene in the instant case. The Complaint requests, inter alia, that the Defendants develop, submit, and implement detailed plans to eliminate all vestiges of a dual system of higher education within the State. To secure their objectives and interest, ULDF and NANA need to be party Defendants to give their input in any and all programs which may be devised to comply with the requests

of the Complaint, for all such proposals would have a direct bearing on the two said moving parties. The intervention of ULDF and NANA would not unduly delay or prejudice the adjudication of the rights of the original parties.

THEREFORE, movants pray that the Court will grant them status as intervening defendants.

Respectfully submitted,

/s/ DEMETRIUS C. NEWTON

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Attorney for Intervening
Defendants

Thomas M. Todd, Esquire
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Attorney for Intervening
Defendants

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Intervene has been served on all counsel of record by United States mail, postage prepaid, on this the 19th day of August, 1983.

/s/ DEMETRIUS C. NEWTON

Demetrius C. Newton

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NUMBER
THE STATE OF ALABAMA, et al.,	)	83-C-1676-S
Defendants.	)	

MEMORANDUM OPINION AND ORDER
GRANTING LIMITED INTERVENTION

Petitioners University Legal Defense Fund ("ULDF") and National Alumni Normalite Association ("NANA") seek intervention in this action so that they may ". . . give their input in any and all programs which may be devised to comply with the requests of the Complaint, for all such proposals would have a direct bearing on [them]."

ULDF is a non-profit corporation whose mission is, among other things,

> ". . . to secure financial compensation for Alabama A & M as a result of past years of discrimination funding, and to insure that Alabama A & M maintains its identity as a predominantly black institution, while at the same time making its resources available to all qualified persons without regard to race, color, or creed."

NANA is an organization of alumni of Alabama A & M University, ("A&M") with a mission similar to that of ULDF.

Petitioners are not entitled to intervene as of right, because they have neither established an unconditional statutory right of intervention, nor have they established that any of their le-

gally cognizable rights are inadequately represented by the existing parties.

However, the petitioners' claims include factual and legal questions common to those raised by the plaintiff and the re-aligned plaintiffs. To the extent that those questions relate to alleged statutory and constitutional violations, unrestricted intervention will unduly delay the adjudication of the rights of the original parties, since a trial date has already been set. More importantly, as to these alleged violations, petitioners' interests are co-extensive with those of A&M, a party to this action; and those interests are being adequately protected by A&M.

If the plaintiff and the re-aligned plaintiffs prevail in this action, it appears to the Court, in the exercise of its discretion, that ULDF and NANA should be heard on any proposed plans of desegregation. Accordingly, their intervention in the action should be limited to that of presenting to the Court their views, by testimony or otherwise, on any proposed plan of desegregation which involves A&M, should this case reach that post-trial stage.

It is therefore ORDERED that the University Legal Defense Fund and the National Alumni Normalite Association be granted limited intervention in this cause, for the purpose of providing the Court with their views on any plan of desegregation which may be presented to the Court in the event that the plaintiffs and the re-aligned plaintiffs prevail at trial.[1]

DONE this 28th day of November, 1984.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

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[1]Counsel for ULDF and NANA need not be served with papers hereinafter to be filed in this case, other than this order, unless and until the Court renders a decision in favor of plaintiff and re-aligned plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	CV-83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Auburn University and its Board of Trustees (hereinafter referred to as "Auburn University" or "Auburn"), defendants herein, hereby appeal to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a), from the Order and Memorandum Opinion entered in this action on the ninth day of December, 1985.

Bases for Appeal of the Court's Memorandum of Opinion and Order

Auburn's appeal is brought pursuant to 28 U.S.C. § 1291, which provides that Courts of Appeals shall have jurisdiction of appeals from final judgments of United States District Court and, alternatively, pursuant to 28 U.S.C. § 1292(a)(1), which provides that Courts of Appeals shall have jurisdiction of appeals from interlocutory orders granting injunctive relief. These alternative bases for appeal will be developed herein.

Statement of Facts

This action was commenced by the United States on June 11, 1983 against the State of Alabama, its Governor, its State

Board of Education, ten state colleges and universities, the Alabama Commission on Higher Education and the Alabama Public School and College Authority. The action was brought pursuant to Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.

The Complaint alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education had made findings that the State of Alabama was in violation of Title VI by failing to eliminate the vestiges of a former racially dual system of higher education. The Complaint also alleges that upon failure of the State of Alabama to present a desegregation plan satisfactory to the Department of Education, such Department referred the matter to the Department of Justice for enforcement.

The Complaint states that prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. Among the defendant institutions, the Complaint alleges Alabama A&M University and Alabama State University to be traditionally black institutions and all others, including the defendant Auburn University, to be traditionally white institutions.

On July 25, 1983 a motion was filed by Alabama A&M University to be realigned as party plaintiff in order to assert Title VI, 42 U.S.C. § 1981 and 1983 and Fourteenth Amendment claims against Auburn University, the University of Alabama and the State of Alabama. A similar motion was filed by Alabama State University on August 3, 1983. The Court granted these motions and gave Alabama A&M and Alabama State leave to assert claims, as plaintiffs, against the defendants.

On September 6, 1983, Auburn University moved to disqualify the trial judge pursuant to 28 U.S.C. § 144 and 28

U.S.C. § 455. As grounds therefor, Auburn asserted, *inter alia*, that the trial judge was biased and prejudiced against it and in favor of the realigned plaintiffs Alabama A&M University and Alabama State University and that his relationship with Mr. Donald Stewart, counsel for Alabama A&M, who as a United States Senator had sponsored his nomination as a United States District Judge three years earlier, was such that a reasonable person might doubt his impartiality. This issue was particularly important to Auburn because Alabama A&M was asserting a right to administrative control, in the northern half of Alabama, of the Alabama Cooperative Extension Service and the Alabama Agricultural Experiment Station, both of which have been administered by Auburn University for seventy-five years. Auburn also alleged that the trial judge had extrajudicial access to facts relevant to the present action because he was one of the attorneys for plaintiffs in *Lee v. Macon County Board of Education*, the previous statewide public school and college desegregation suit in Alabama.

The trial court overruled the motion to disqualify. On October 12, 1983, Auburn University filed a petition for writ of mandamus with the Eleventh Circuit Court of Appeals setting forth that its motion for disqualification under both 28 U.S.C. § 144 and 28 U.S.C. § 455 should have been granted. The Court of Appeals held Auburn's § 144 affidavit to be legally sufficient but remanded the matter with directions that another judge assigned to hear the recusal proceedings. On December 19, 1983, Judge Hobart H. Grooms of the United States District Court for the Northern District of Alabama entered an opinion and order finding that a reasonable person would harbor a doubt as to the trial judge's impartiality and granting Auburn's motion for recusal. On January 19, 1984, Judge Grooms vacated his order and recused himself, stating that the recusal proceedings should be heard by a judge who was not a member of the United States District Court for the Northern District of Alabama. On February 13, 1984, the matter was heard again before the Honorable Judge David W.

Dyer who, on March 16, 1984, denied Auburn's motion for recusal of the trial judge.[1]

On September 15, 1983, a class of individuals described as "students, alumni, faculty and administrators of Alabama State University," represented by John F. Knight, Jr., moved the Court to intervene in the present action. The "Knight Intervenors" sought in their complaint an intervention to eliminate the "vestiges of prior *de jure* segregation" alleged to be present in the three Montgomery, Alabama public institutions of higher education, Auburn University at Montgomery, Alabama State University and Troy State University at Montgomery. The Knight class was certified and intervention was allowed by the District Court on January 3, 1985.

After one and one half years of intensive discovery, in which a number of disputes arose, including one area of controversy that resulted in conflicting decisions by the trial court and Judge Marvin Shoob of the United States District Court for the Northern District of Georgia, the case was tried during the entire month of July and the first week of August, 1985. The

[1]Subsequently, in June of 1984, the United States District Court for the Northern District of Georgia compelled the United States to produce documents requested by Auburn during depositions of United States Department of Education personnuel in Atlanta. These documents included a newspaper clipping attached hereto as Exhibit A, which relates the trial judge's actions while a member of the Alabama State Senate in leading a filibuster, on racial grounds, in opposition to the appointment of a white person as a member of the board of trustees of predominantly black Alabama State University. The existence of this document was unknown to this defendant at the time the recusal motions were being considered, and it is obviously relevant on that issue. But it is also relevant on the merits. Dr. Steven Wright, a United States' expert witness, gave opinion evidence the elimination of racial identifiability of student bodies. The article was made an exhibit to Dr. Wright's deposition, but the trial court refused to permit cross-examination of the witness on this issue and refused to allow the deposition and its exhibits to be introduced into evidence at trial. In the trial court's Memorandum Opinion, the racial identifiability of institutional governing boards, including Alabama State's was considered "probative" to the "question of whether the dual system has been disestablished." Opinion at 62, 75. The fact that the "Governor has generally appointed blacks to the board" was characterized as a vestige of segregation. Opinion at 75.

trial involved 9000 pages of transcript, and over 1,700 exhibits were introduced.

On December 9, 1985 the Memorandum of Opinion and Order, which concluded "that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; that in other respects, the 'root and branches' of the dual system have not been eliminated," was entered. Memorandum of Opinion at 2. The court ordered the "Defendants State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority [to] submit to the Court not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama." The Court's Order specified that within fifteen days the "affected institutions" will submit their "comments or objections" to the plan in twenty-five pages or less. *See* Order at 2.

In its opinion, the trial court declared no longer viable a United States Supreme Court decision from this circuit, *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd.* 393 U.S. 400 (1969), which has not been overruled and which establishes duties and principles of law in relation to desegregation in higher education that are irreconcilable with the District Court's Order.

The Court's Memorandum of Opinion, with a high degree of specificity, makes the following findings, *inter alia,*

1) that "[t]he continued recognition of a special 'constitutional status' for the University of Alabama and Auburn due to their inclusion in the 1901 constitution, when Alabama State and Alabama A&M were omitted from the said constitution for racial reasons, is a vestige of the dual school system." (Opinion at 91),
2) that the assignment of the Alabama Agricultural Experiment Station and the Alabama Cooperative Extension Service to Auburn University is unconstitutional, (Opinion at 56, 61-62),

3) that Auburn University's admissions requirements impermissibly exclude blacks from attendance at Auburn, (Opinion at 71-72),
4) that Auburn does not actively recruit blacks for faculty positions (Opinion at 71),
5) that "[t]here is substantial needless duplication of the education and business programs offered by AUM [Auburn University at Montgomery] and ASU [Alabama State University]," and that "[t]he presence of duplicated programs at AUM – a much newer and more attractive facility than ASU – has a negative impact on which enrollment at ASU," (Opinion at 75),
6) that the "undergraduate and graduate teacher education and certification programs offered at UAH [University of Alabama in Huntsville] unnecessarily duplicate similar and older programs offered at [Alabama] A&M" and thereby reduce its white enrollment, (Opinion at 66-67),
7) that computer science courses at UAH unnecessarily duplicate similar courses at A&M thereby reducing white enrollment at A&M, (Opinion at 67),
8) that the races of the chief executive officers of the Alabama public institutions of higher education is a vestige of the prior *de jure* segregated system of higher education, (Opinion at 89),
9) that "Alabama's choice of resource allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and [Alabama] A&M to attract white students," (Opinion at 89), and
10) that the state's financial resource allocation for things other than facilities has caused Alabama A&M's and Alabama State's student bodies to remain segregated, (Opinion at 90-91).

In the Order appealed from, the District Court ordered and directed that each of these "vestiges" be eliminated, directing that a plan to eliminate them be submitted by four of the defendants by February 14, 1986 and permitting Auburn and

others to comment within fourteen days in twenty-five pages or less.

The grounds for Auburn's appeal will be embraced in two general headings, *viz*: (1) errors in the Court's legal conclusions and evidentiary findings on the merits and (2) error in denying Auburn's recusal motion under the facts as set out in Auburn's 28 U.S.C. § 144 affidavit and as presented at the hearings on recusal.[2]

Auburn will establish in its brief to be filed later in this appeal that the District Court's Memorandum of Opinion and Order apply incorrect legal principles and make factual findings that are clearly erroneous. The evidence presented during the trial of this action established that race played no part in the Alabama constitutional provisions vesting management and control of Auburn University and the University of Alabama in their boards of trustees, that AUM has been a race neutral institution since its creation, that allocation of state financial resources has not disfavored ASU or A&M, that Auburn's status as administrator of Alabama's statewide agricultural Experiment Station and statewide Cooperative Extension Service[3] — has nothing to do with race, that the ACT as used by Auburn is a valid test and that Auburn actively recruits black faculty. Auburn will also establish that based upon the evidence available prior to the March, 1984 order on recusal, it was abundantly clear that the trial judge has an extrajudicial bias against Auburn as well as against others for whose actions the United States contends Auburn is to be held accountable.[4]

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[2]As held by the Eleventh Circuit in considering Auburn's petition for mandamus, "The affidavit sets forth sufficient factual allegations to require that the 'judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.' 28 U.S.C. § 144." The record will demonstrate that in denying Auburn's recusal motion, Judge Dyer did not find that the facts presented in the § 144 affidavit were untrue.

[3]The administrative structure of the Alabama Cooperative Extension Service was desegregated and reorganized pursuant to court orders in *Strain v. Philpott,* CV840-E, United States District Court for the Middle District of Alabama, which currently exercises continuing jurisdiction over these matters.

[4]The United States has never cited or relied on "institutional" vio-

The Court's Order and Memorandum of Opinion Constitutes a "Final Judgment" Appealable Pursuant to 28 U.S.C. § 1291

28 U.S.C. § 1291 provides that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ., except where a direct review may be had in the Supreme Court.

What constitutes a "final decision" has been the subject of extensive discussion in the appellate courts of the United States, especially where the district court appears to have decided less than all of the issues in the case or where, as here, the court orders one or more of the parties to devise a plan to implement its decision.

The United States Supreme Court addressed just such an issue in *Brown Shoe Company, Inc. v. United States,* 370 U.S. 294 (1962). *Brown Shoe* was an appeal brought pursuant to the Expediting Act, 15 U.S.C. § 29,[5] from a decision of a district court in an antitrust action.

The district court's order in *Brown Shoe* held that the merger of Brown Shoe Company with Kinney Shoe Company substantially lessened competition in the family shoe market and constituted a violation of the Clayton Act, 15 U.S.C. § 18. *See United States v. Brown Shoe Company,* 179 F.Supp. 721 (E.D. Mo. 1959). The district court ordered the defendant Brown Shoe Company to "relinquish and dispose of the acquired stock of defendant Kinney" and enjoined "Brown and

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lations of Title VI; indeed, the Department of Education investigation found none. Rather, the United States has focused throughout on a "statewide" approach that disregards institutional innocence, contrary to *Grove City College v. Bell,* _____ U.S. _____, 104 S. Ct. 1211 (1983), and for that reason bias of the trial judge for or against any institution agency or official of higher education in Alabama has the potential to impact upon Auburn University under the United States' approach to this case.

[5]The Expediting Act provides that the United States Supreme Court has jurisdiction of appeals from final orders of United States district courts in antitrust cases in which the United States is a party.

Kinney, their agents, servants, officers and employees from acquiring any interest in the stock or assets of the other defendant." *See* 179 F.Supp. at 741.

The district court, recognizing the complexity of the situation and the difficulty of implementation of the divestiture, held that it "should hear any evidence which the defendants might wish to offer touching the effects of the disposition of the stock and the suitable manner in handling same. The government should be given an opportunity to express opposition or suggestion therein." 179 F.Supp. at 742. The court held that no "final" judgment would be entered until after such hearing and the approval by the court of an acceptable plan for divestiture. 179 F.Supp. at 742.

Brown Shoe Company appealed the order of the district court immediately, without waiting for a decision from the district court adopting a plan for the divestiture. The United States Supreme Court raised the issue of the finality of the district court's decision on its own, stating that, "[i]t was suggested from the bench during the oral argument that, since the judgment of the District Court does not include a specific plan for the dissolution of the Brown-Kinney merger, but reserves such a ruling pending the filing of suggested plans for implementing divestiture, the judgment below is not 'final' as contemplated by the Expediting Act." 370 U.S. at 305. The Court, after noting that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action,'" 370 U.S. at 306; held that the decree of the district court "had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time." 370 U.S. at 308.

The Supreme Court held that the requirement of the submission of a plan designed to implement the order for divestiture did not deprive it of jurisdiction since, in the event the District Court's order was affirmed, "the sole remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree,

. . . are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case in its present posture a proper one for review now." 370 U.S. at 308.

The Court's decision that the order was final was buttressed by the fact that the "[a]ppellant here does not attack the full divestiture ordered by the District Court as such; it is appellant's contention that under the facts of the case, as alleged and proved by the Government, *no* order of divestiture could have been proper. The propriety of divestiture was considered below and is disputed here on an 'all or nothing basis' " 370 U.S. at 308-309.

An additional reason cited by the Court for deciding the issue in favor of finality was the magnitude of the divestiture ordered by the district court. The Court held that "[s]uch an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws." 370 U.S. at 309.

Thus, the Court ruled that where the order of a district court makes clear the result sought, the fact that the method for the accomplishment of the result is yet to be established does not render the court's decision any less "final." Rather, when the court has decided the issue of liability and has ordered the relief sought in the complaint, the fact that further rulings of the district court may be necessary to implement or administer its decree does not deprive the appellate court of jurisdiction. *See* 370 U.S. at 308.

In *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the United States Supreme Court defined and elaborated on the principles applied in *Brown Shoe* in holding that the requirement of finality is to be given a "practical rather than a technical construction." The Court held that questions in the so-called "twilight zone of finality" should be decided

by balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," as well as by considering the importance of the question presented to "the further conduct of the case." 379 U.S. at 152-153. The court in *Gillespie* conclusively established that in order to be "final," a decision need not be "the last order possible to be made in a case." 379 U.S. at 152.[6]

In *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974) *cert. denied*, 419 U.S. 1108 (1974), the Sixth Circuit Court of Appeals applied the principles set forth in *Gillespie* to an order of a district court that individual plaintiffs had made out a case under the Fair Housing Act that municipal defendants had violated the plaintiffs' constitutional rights by refusing to execute cooperation agreements with a housing authority to construct low-cost housing. The district court "treated the case before him like a school desegregation case and ordered CMHA [the housing authority] 'to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs.'" 500 F.2d at 1090. The court held that the municipal defendants had the burden of showing "a compelling necessity" for not complying with the plan submitted. 500 F.2d at 1090-91, n.3.

The municipal defendants appealed prior to the submission of the court-ordered plan, and the Court of Appeals addressed the issue of finality as follows:

> *Gillespie* indicated that an appellate court should give consideration to four factors in determining whether an order of a lower court is 'final' within the meaning of 28 U.S.C. § 1291:

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[6]*See Thoms v. Heffernan*, 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds*, 418 U.S. 908 (1974), in which a decision of a United States District Court declared a flag misuse statute unconstitutional but neither granted nor denied injunctive relief. The Court of Appeals held that "[t]he fact that further proceedings leading to an injunction are possible below does not render the judgment of the district court in this case any less final." 473 F.2d at 481.

1. — Whether an order is final depends on whether it has been given a 'practical rather than technical construction,' . . . .
2. — Whether an order is final depends on whether the issue appealed is fundamental to the further conduct of the litigation . . . .
3. — Whether an order is final depends on whether the parties will be put to additional expenses if the appealed issue is not resolved by the appellate court.
4. — In cases where the issue of finality is close or marginal, the court of appeals should find in favor of finality.

500 F.2d at 1090-91, n.3.

The *Mahaley* court held that the four elements of finality, as they applied to the case before it, were satisfied in that: 1) the district court had, in effect, rejected any reason the municipal defendant might advance for not executing the cooperation agreements in question, 2) the question of whether the municipalities had violated 42 U.S.C. § 1983 by their refusal to sign cooperation agreements was "fundamental to the further conduct of this case," 3) the inconvenience and cost of a second trial would be great, especially since "the trial record contains all the evidence necessary for this Court to make a full and complete disposition of all of the issues in the case," and 4) the issue of finality was not even close. *See* 500 F.2d at 1091, n.3.

In *Morales v. Turman*, 535 F.2d 864 (5th Cir. 1976), *rev'd* 430 U.S. 322 (1977) (expressly affirming on the issue of the finality of the district court's order), the Fifth Circuit Court of Appeals reviewed the decision of the United States District Court for the Eastern District of Texas that the constitutional rights of minors incarcerated in Texas juvenile correctional facilities had been violated and ordering all parties to meet and agree upon a plan to eliminate the unconstitutional conditions found by the district court in accordance with certain "minimum standards" enumerated by the court in *Morales v. Turman*, 333 F. Supp. 53 (E.D. Tex. 1974). The Fifth Circuit

held that the district court's order was final under 28 U.S.C. § 1291, stating:

> Appellees concede the finality and appealability of the lower court's determination that the constitutional rights of minors incarcerated by the TYC have been violated. They maintain, however, that the detailed 'minimum standards' necessary for protection of those rights — particularly the right to treatment — are not final because the judge withheld issuance of permanent injunctive relief pending submission of a comprehensive plan to be drawn up by the parties. The difficulty with this contention is that while some flexibility was left to the parties in determining precisely how compliance with the minimum standards would be structured, the District Court made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion. *See* 383 F. Supp. at 126. In circumstances such as these, the requirement of finality must be given a practical construction. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 85 S. Ct. 308, 311, 13 L.Ed. 2nd 199 (1964). The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable.[7]

535 F.2d at 867, n.6.

The Fifth Circuit rejected the contention by the appellee that the minimum standards established by the district court were "mere guidelines subject to further negotiation by the parties." Rather, the court held that the district court's opinion constituted:

> "a final ajudication determining the minimal content that must be given to the 'right to treatment' as it applies to virtually every aspect of TYC operations."

535 F.2d at 867, n.6.[8]

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[7]The United States Supreme Court, though reversing on the merits, expressly affirmed the Fifth Circuit's holding as to finality.

[8]The *Morales* opinion is consistent with the Fifth Circuit's decision in *Board of Public Instruction of Duval County v. Braxton*, 326 F.2d 616 (Fifth Cir. 1964). In *Braxton*, the Fifth Circuit held that the order of a

As in *Brown Shoe,* the district court order has made specific findings of illegal conditions and practices, and has ordered the state to submit a plan to eliminate those conditions and practices. "The sole remaining task for the District Court will be its acceptance of a plan [to eliminate the vestiges][9] and the supervision of the plan so accepted." *See Brown Shoe Co. v. United States,* 370 U.S. 294, 308 (1962). *Brown Shoe* illustrates that the court's decision is not merely a decision on liability, leaving remedy to be decided at a later time.

It is clear that, as in *Morales,* the court in the instant case, while leaving some "flexibility" to the State in determining precisely how the elimination of the vestiges would be accomplished, "made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion." *See Morales,* 535 F.2d at 867, n.6. "The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable." *See Morales,* 535 F.2d at 867, n.6. As the Fifth Circuit stated in *Morales,* the vestiges found by the Court "constitute a final adjudication determining" the conditions in Alabama's public institutions of higher education which must be either eliminated or changed in strict accordance with the court's opinion in order for any plan submitted by the State to comply with the order.

The court's exclusion of Auburn and the other state institutions of higher education from the planning process is another

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district court in a school desegregation case that a plan be submitted that would eliminate certain specified unconstitutional conditions in the school system was appealable because it foreclosed any discretion on the part of the school board ordered to submit the desegregation plan by specifically enumerating the conditions to be eliminated. *See* 326 F.2d at 619.

[9]It would not be inaccurate to say that the district court has ordered the defendants to "divest" themselves of the "vestiges" it found. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 305 (1962). As in *Brown Shoe,* the United States received *everything* it asked for, an order requiring the submission of a plan designed to eliminate the alleged vestiges of the prior racially dual school system.

ground for deciding the question of practical finality in favor of Auburn. From its standpoint, Auburn has been found guilty and has no say as to remedy in this case other than to object to and comment upon the plan submitted by the State defendants in twenty-five pages or less. The exclusion of Auburn from the planning process effectively ends the trial as far as Auburn is concerned and makes the court's decision final.

The other three elements of finality enumerated by the *Mahaley* court are all in favor of finality in this case. First, there is no question that the correctness of the court's decisions with regard to the vestiges cited by the court in its Memorandum of Opinion, including the constitutional status of Auburn, the administration of the Alabama Agricultural Experiment Station and Alabama Cooperative Extension Service,[10] Auburn's admissions requirements and the duplication of programs is fundamental to the further conduct of this case. Reversal of the court on these issues would have a profound impact on its finding of liability in general and completely redefine any remedy ordered.

Next, the inconvenience and cost of a second trial in this case, should the court's decision be reversed, as well as the expense of discovery and a hearing in the remedial phase, justify appeal at this time, especially since, as in *Mahaley*, "the trial record contains all of the evidence necessary for [the Appellate Court] to make a full and complete disposition of all of the issues in this case." 500 F.2d at 1091. This factor is particularly important in this case since, as in *Brown Shoe*, administration of the remedy will likely be a lengthy and complicated task.

A reversal by the Court of Appeals on any of the major issues before it on this appeal, such as whether the District Court had

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[10]Title VI enforcement authority for these programs rests with the U.S. Department of Agriculture under 7 CFR Part 15, and the appendix thereto. USDA has found them to be *in compliance* with Title VI, and USDA had no role in bringing this action. These programs were not, and could not properly have been, included in the Title VI investigation by the Department of Education, which caused this action to be filed.

jurisdiction of claims relating to programs administered by the United States Department of Agriculture,[11] whether program transfers are necessary or appropriate between Auburn University in Montgomery[12] and Alabama State University, whether Alabama A&M and Alabama State have been discriminated against in terms of financing and capital improvements or whether Auburn's use of high school grades in combination with the American College Test as an admissions criterion is valid, would, if decided in Auburn's favor, narrow the scope of relief in the case and thereby reduce the time and expense associated with the implementation and administration of any plan approved by the court. Similarly, and perhaps even more importantly, reversal on the issue of recusal at this point in the proceedings would be more economical than reversal after the approval and implementation of a plan.

Finally, any court-approved plan that is designed to alter the racial composition of students and faculty at the defendant universities would be more effective if the legal conclusions and factual findings underlying the implementation of the plan were reviewed by this Court prior to the plan's implementation. The success or failure of any plan approved by the court will depend not only upon the efforts of the parties but upon the public's perception of its permanence. A plan perceived as temporary pending review by the Court of Appeals will not likely affect attendance patterns of students nor application flow for faculty positions. On the other hand, if the order requiring submission of a plan is not reviewed now, the administration of the plan will disrupt, perhaps needlessly, the education of students and affect employment of faculty, including tenured faculty, at institutions whose programs are altered consistent with the court's opinion. "The unsettling influence of

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[11]See note 10 *supra*.

[12]AUM was created after legal segregation ended in Alabama, and it is undisputed that it has never been segregated or discriminated against anyone on the basis of race. Its creation was approved in *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd.* 393 U.S. 400 (1969).

uncertainty as to the affirmance of the initial, underlying decision compelling" the implementation of the plan "would only make still more difficult the task of assuring expeditious enforcement" of the civil rights laws. *Cf. Brown Shoe Company v. United States,* 370 U.S. 294, 309 (1962).

Finally, since the Court of Appeals should find in favor of finality "where the issue of finality is close or marginal," the similarity of the case at bar to the *Brown Shoe, Mahaley,* and *Morales* cases should compel a determination that the court's Memorandum of Opinion and Order are final and appealable.

The Court's Order is a Mandatory Injunction Appealable Pursuant to 28 U.S.C. § 1292(a)(1)

An order requiring the submission of a plan to implement a decision of a United States district court may be appealable as a final decision, under 28 U.S.C. § 1291, or as an interlocutory mandatory injunction appealable under 28 U.S.C. § 1292 (a) (1). *See Morales v. Turman,* 535 F.2d 864, 867, n.6 (5th Cir. 1976), *rev'd.* 430 U.S. 322 (1977) (expressly affirming on the issue of finality). In the present case, even if the order of the district court is not a "final decision", it is a mandatory injunction appealable pursuant to 28 U.S.C. § 1292 (a) (1).

In *Board of Public Instruction v. Braxton,* 326 F.2d 616 (5th Cir. 1964), the Fifth Circuit Court of Appeals held that the order of the United States District Court for the Middle District of Florida requiring a county school board to submit a plan designed to eliminate segregation in the county's schools was a mandatory injunction appealable pursuant to 28 U.S.C. § 1292 (a) (1). The court distinguished the case before it from *Taylor v. Board of Education,* 288 F.2d 600 (2nd Cir. 1961), which held that a similar order was not appealable, on the grounds that the Florida court's order denominated certain practices and conditions which should be addressed by the plan. To the extent the Second Circuit held otherwise in *Taylor,* the Fifth Circuit expressly differed with that court's judgment. *See Braxton,* at 619. In the instant case, as in *Braxton,* the district

court has ordered the State to submit a plan eliminating vestiges specifically enumerated by the court in its order. Thus, the court in this case, as in *Braxton,* "positively and affirmative directed that a plan be submitted that *would provide for carrying out*" the elimination of the vestiges noted (emphasis supplied by court). *See* 326 F.2d at 619.

The fact that only the Governor, the Alabama Commission on Higher Education and the Alabama Public School and College Authority were ordered to prepare and submit the plan does not render the order unappealable as to Auburn. A litigant who was a party below and who is aggrieved by the judgment or order may appeal the judgment or order. *See e.g. Burleson v. Coastal Recreation, Inc.,* 572 F.2d 509 (5th Cir. 1978). In the present case, Auburn has clearly been "aggrieved" by the court's Memorandum of Opinion and Order. It has been held guilty of racial discrimination and of being a part of a segregated system of higher education of the State. The court has ordered that its state constitutional status violates the United States Constitution and that its status as the premier land-grant institution in the State of Alabama is due to impermissible racial motives. Its use of the ACT test as an admissions criterion has been held invalid. Critical programs at AUM, which without dispute has never discriminated based on race, have been characterized as vestiges of an era in which it did not exist.[13] The Court has ordered the State to submit a plan which would eliminate all of these conditions that Auburn has defended as race neutral and sought to preserve. Thus, Auburn is clearly "aggrieved" by the Court's opinion, even if it has not been ordered, or allowed, to participate in the preparation and submission of the plan.

Even non-parties have been allowed to appeal judgments of United States District Courts if the court's decree significantly affects their interests; *see e.g., United States v. Chagra,* 701 F.2d 354 (5th Cir. 1983); *Securities and Exchange Commission v. Lincoln Thrift Association,* 577 F.2d 600 (9th Cir. 1978); *West*

[13]See note 12 *supra.*

v. Radio-Keith Orpheum Corp., 70 F.2d 621 (2d Cir. 1934); or requires action on their part to effectuate the remedy. *See Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). In both *Securities and Exchange Commission v. Lincoln Thrift Association*, and *West v. Radio-Keith Orpheum Corp.*, non-party creditors who asserted rights in receivership proceedings were allowed to appeal orders affecting their legitimate interests. In *Chagra* as well as in many other cass from the Fifth Circuit, non-parties were allowed to appeal orders of district courts enjoining the publication of court files or the closure of hearings from the public. *See also Belo Broadcasting Corp. v. Gurney*, 654 F.2d 423, 425-426 (5th Cir. 1981); *United States v. Gurney*, 558 F.2d 1202, 1206-07 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

In *Brown v. Board of Bar Examiners of State of Nevada*, 623 F.2d 605 (9th Cir. 1980), the district court dismissed the Board of Bar Examiners of the State of Nevada from an action to enjoin the state from denying a graduate of an unaccredited law school admission to the state bar. Nevertheless, the court issued a preliminary injunction enjoining the "defendants" from preventing Brown from sitting for the bar examination. 623 F.2d at 607. Because the Supreme Court of Nevada had delegated to the Board of Bar Examiners the power to examine applicants for admission to the Bar, the Ninth Circuit Court of Appeals held that the Board was a proper party to appeal the district court's ruling, regardless of the lower court's holding that the Board was due to be dismissed from the case. 623 F.2d at 607. Auburn will be required to comply with whatever plan is approved by the Court regardless of its participation in plan formulation. Therefore, Auburn would be a proper party to appeal even were it not a party to the litigation.

Conclusion

Auburn has asserted two bases for appeal of the court's Memorandum of Opinion and Order. First, the Memorandum of Opinion and Order constitute a "final decision" appealable

pursuant to 28 U.S.C. § 1291 because its practical effect is to decide all of the issues, including remedial issues, in the present action. Alternatively, if interlocutory, the order is a mandatory injunction appealable pursuant to 28 U.S.C. § 1292 (a) (1) because it specifies the elements to be addressed by the plan submitted by the state defendants. Based upon the foregoing legal authorities, the memorandum of opinion and order are appealable by Auburn University without further action by the United States District Court for the North District of Alabama. In this appeal, the grounds will be error in legal principles applied and clear error in findings of fact, both on the merits and regarding recusal.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon the following attorneys by first-

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EXHIBIT A

Solon Seeks Black Majority

Clemon Opposing ASU Board Nomination

By Lenore Reese

The chairman of Alabama State University's board of trustees may never be confirmed by the State Senate because of what one black senator has termed "racially discriminatory" actions by Gov. George Wallace.

Tom Radney, a white Alexander City attorney and former state senator, has been serving as board chairman since March 1975, although he has never been approved by the Senate.

And he won't be, according to Senator U. W. Clemon of Birmingham, who said today he'll oppose Radney's confirmation because he wants a black majority on the board.

Currently the board for the predominantly black school has a 5-4 white majority.

Clemon termed Wallace's appointment of five whites and four blacks "evidence of his undying dedication to the belief that black people are incapable of governing themselves."

Radney was the only ASU trustee not confirmed by the Senate during the last regular legislative session. His name was resubmitted by the governor's office during the current special session but has remained in the Rules Committee of which Clemon is acting chairman.

Clemon said he had "ample support" within the committee to keep the appointment from being brought before the full Senate.

Contacted in Alexander City, Radney said he planned to continue serving as board chairman under his "interim appointment" by the governor despite Clemon's opposition.

Radney said he did not think Clemon's stand was a personal matter because, "I don't even know him."

"I would call his attention to my voting record in the Senate on behalf of minorities," Radney said, adding that he was

"color-blind" and didn't believe in "quotas" on boards of trustees or elsewhere.

Radney was re-elected board chairman for another year last month.

Clemon said a similar situation involved confirmation of two trustees at the state's other predominantly black university, Alabama A&M in Huntsville.

He said Wallace's appointment of majority white boards of trustees at the two black schools was another example of his "racially discriminatory" behavior.

Clemon said he had no specific person in mind to replace Radney, only that he or she be a graduate of the university.

Under the bill creating the ASU board, the nine were to be appointed from each of the seven congressional districts and two from the state at large.

Before the board was created, the school was under the control of the State Board of Education.

Should Radney continue to serve without Senate confirmation, Clemon said he plans to take another look at the statute setting up the board to see if such a move would be legal.

Alabama Journal 6/6/77

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7090

AUBURN UNIVERSITY,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
JOHN F. KNIGHT, JR., et al.,
individually and on behalf
of others similarly-situated,
BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY
and ALABAMA A&M UNIVERSITY,
Plaintiffs-Appellees.

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION FOR A STAY OF THE MEMORANDUM OF OPINION AND ORDER OF THE DISTRICT COURT PENDING APPEAL

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Honorable George C. Wallace, Governor
Honorable U. W. Clemon, U. S. District Judge
Wayne Teague, Superintendent of Education
Alabama Public School and College Authority;
members in their official capacities
Alabama Commission on Higher Education;
members in their official capacities
The Board of Trustees of the University of Alabama;
members in their official capacities
The Board of Trustees of Alabama A&M University
The Board of Trustees of Alabama State University
The Board of Trustees of the University of
North Alabama
The University of South Alabama
The University of Montevallo
Jacksonville State University
Livingston University
The Board of Trustees of Troy State University;
members in their official capacities
The Board of Trustees of Auburn University;
members in their official capacities
John F. Knight, Jr., class action intervenor
Catherine Coleman, class action intervenor
Charles R. Anderson, class action intervenor
Alma S. Freeman, class action intervenor
John T. Gibson, class action intervenor
Susan Buskey, class action intervenor
Carl Petty, class action intervenor
Tamara L. Knight, class action intervenor
Dennis Charles Barnett, class action intervenor

That class of persons certified by the District Court on January 3, 1985
Sid McDonald, State Finance Director

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By /s/ EDWARD S. ALLEN

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MOTION FOR A STAY OF THE MEMORANDUM OF OPINION AND ORDER OF THE DISTRICT COURT PENDING APPEAL

Auburn University and its Board of Trustees (hereinafter Auburn), appellants herein, hereby make application for a stay of execution of the Memorandum of Opinion and Order entered by the District Court for the Northern District of Alabama in the case of *United States of America, et al. v. State of Alabama, et al.*, Civil Action No. 83-C-1676-S, on December 9, 1985. This matter is before this court on appeal, both from the court's order of August 20, 1985 granting Alabama State University's and the Knight Intervenors' request for a preliminary injunction, Eleventh Circuit Case No. 85-7582, and from the trial court's decision on the merits entered on December 19, 1985, (*See* Order and Opinion, attached hereto in Appendix One and Auburn's Notice of Appeal, attached hereto in Appendix Two).

This application for stay is directed to the court's order requiring submission, on February 14, 1986, of a plan to eliminate the vestiges of the "dual system of higher education in Alabama," and requiring the "affected institutions" to submit their comments or objections to the plan within 15 days.

The filing of Auburn's Notice of Appeal under 28 U.S.C. § 1291 has divested the district court of jurisdiction over further proceedings with respect to any plan submitted. In the event this court accepts jurisdiction of Auburn's appeal under 28 U.S.C. § 1292(a), however, Auburn, in the alternative, moves the court to stay all further proceedings with respect to any plan submitted, pending appeal.[1]

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[1]*United States v. Hitchmon*, 602 F.2d 689 (5th Cir. 1979) (*en banc*), holds that if a district court wrongly treats a notice of appeal as "manifestly ineffective" and proceeds to exercise jurisdiction over a matter currently under the jurisdiction of the court of appeals, then "the appellant may seek the aid of the court of appeals by applying for a writ of prohibition under 28 U.S.C. § 1651." The avoidance of proceedings in this court on a petition for writ of prohibition, in the event the district court wrongly characterizes Auburn's Notice of Appeal as "manifestly ineffective" is an additional reason to stay further proceedings in

As grounds for this motion, defendant shows unto the court that personal and property interests of Auburn, its students and faculty, the Alabama Agricultural Experiment Station (hereafter AAES) and the Alabama Cooperative Extension Service (hereafter ACES),[2] as well as Auburn's ability to attract qualified students, faculty and staff of all races will be irreparably damaged if the District Court's Opinion and Order are not stayed. The merits of this case involve many serious legal questions upon which Auburn has a substantial likelihood of success, including whether *Alabama State Teachers Association v. Alabama Public School and College Authority*,[3] which the trial court expressly declined to follow, is binding precedent. A more thorough review of Auburn's grounds for a stay follows.

I. STATEMENT OF THE CASE.

This action was commenced by the United States on June 11, 1983 against State of Alabama, its Governor, its State Board

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the court below, regardless of whether jurisdiction is accepted under 28 U.S.C. § 1291 or 28 U.S.C. § 1292.

[2]The ACES has 941 employees who, from offices in all 67 counties in Alabama disseminate information to farmers, homemakers and agribusiness, including the results of agricultural research conducted by the 773 employees, including 188 scientists, of the AAES, at the main station at Auburn and 21 substations throughout the state. The combined annual budget of these two organizations is approximately $45,000,000.

[3]*See Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F.Supp. 784 (M.D. Ala. 1968), aff'd.*, 393 U.S. 400 (1969), which holds that a policy of race-neutral admissions and hiring, administered in good faith, satisfies a college's duty to desegregate. The evidence is undisputed that Auburn has not practiced racial discrimination in student admissions or faculty hiring in the last twenty years, and that AUM has *never* discriminated on the basis of race. (*See* United States Responses to Auburn's Request for Admissions, attached hereto in Appendix Four, Nos. 16, 24).

Segregation in the Alabama Cooperative Extension Service has been eliminated by order of the United States District Court for the Middle District of Alabama in the case of *Strain v. Philpott*, CV-840-E, which continues to exercise jurisdiction over the matter. *See* p. 26, *infra*. As of May 1985, 30% of the ACES's employees were black, including one-half of the Department Heads, 25% of the County Professional Staff, 34%

of Education, ten state colleges and universities, the Alabama Commission on Higher Education and the Alabama Public School and College Authority. The action was brought pursuant to Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983. (*See* Complaint, attached hereto in Appendix Three).

The Complaint alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education had made findings that the State of Alabama was in violation of Title VI by failing to eliminate the vestiges of a formerly racially dual system of higher education. (*See* Complaint, attached hereto in Appendix Three).

The Complaint further alleges that prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. Among the defendant institutions, the Complaint contends Alabama A&M University (hereinafter A&M) and Alabama State University (hereinafter ASU) to be traditionally black institutions[4] and all others, including the Defendant Auburn University, to be traditionally white institutions.

The Complaint alleges that the enrollment, faculty, staff and governing boards at each of the institutions of higher education are still identifiable by race. Further, the Complaint alleges

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of the State Support Staff and 25% of the County Support Staff. For the fiscal year 1983, approximately 25% of total staff contacts were with black clientele. Alabama's population is 26% black.

[4]On July 25, 1983, a motion was filed by Alabama A&M University to be realigned as party plaintiff in order to assert Title VI, 42 U.S.C. §§ 1981, 1983 and fourteenth amendment claims against Auburn, the University of Alabama and the State of Alabama. A similar motion was filed by ASU on August 3, 1983. The trial court granted these motions and gave A&M and ASU leave to assert claims, as plaintiffs, despite the well-established rule that state agencies are not endowed with such rights. *See* pp. 28-30, *infra*. (A&M and ASU Motions to Realign attached hereto in Appendix Three).

that in Montgomery, Alabama and Huntsville, Alabama the existence of Auburn University of Montgomery (hereinafter AUM) and the University of Alabama in Huntsville, in close proximity to ASU and A&M, respectively, impedes the ability of those traditionally black institutions to desegregate. This allegation is based upon an assertion that the academic programs at AUM and UAH unnecessarily duplicate similar programs at ASU and A&M, thereby providing prospective students with a choice of institutions based on race.[5] Finally, the Complaint alleges that the state has discriminated in favor of Auburn and against A&M by selecting Auburn, and not A&M, to be the recipient of the bulk of the state's share of federal financial assistance for agricultural research and instruction.

On September 6, 1983, Auburn moved to disqualify the trial judge pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455 on the grounds that the trial judge was biased and prejudiced against it and in favor of the realigned plaintiffs A&M and ASU, that his relationship with Donald A. Stewart, counsel for A&M, *who as a United States Senator sponsored the trial judge's appointment to the federal bench,* was such that a reasonable person might doubt his impartiality and that the trial judge had extrajudicial access to facts relevant to the trial of the present action because he was an attorney for the plaintiffs in *Lee v. Macon County Board of Education,* the previous state-wide public school and college desegregation suit in Alabama.

The trial court overruled the motion to disqualify. On October 12, 1983, Auburn filed a Petition for a Writ of Mandamus with the Eleventh Circuit Court of Appeals setting forth that its Motion for Disqualification under both 28 U.S.C. § 144 and 28 U.S.C. § 455 should have been granted. (*See* Petition for Writ of Mandamus, attached hereto in Appendix Five). This court held Auburn's § 144 affidavit to be legally sufficient but remanded the matter with directions that another judge be assigned to hear the recusal proceedings. (*See In Re: Au-*

[5]ASU, in its claims, seeks the merger of AUM into ASU in order to preserve ASU as the dominant institution in Montgomery. (*See* Appendix Three).

burn University Opinion of November 10, 1983, Case No. 83-7557, in the United States Court of Appeals for the Eleventh Circuit, attached hereto in Appendix Five).

On December 19, 1983, Judge Hobart H. Grooms of the United States District Court for the Northern District of Alabama entered an Opinion and Order finding that a reasonable person would harbor a doubt as to the trial judge's impartiality and granting Auburn's Motion for Recusal. (*See* Opinion on Motions for Recusal, December 19, 1983, attached hereto in Appendix Five). On January 19, 1984, Judge Grooms vacated his Order and recused himself, stating that the recusal proceeding should be heard by a judge who was not a member of the United States District Court for the Northern District of Alabama. On February 13, 1984, the matter was heard again before the Honorable Judge David W. Dyer who, on March 16, 1984, denied Auburn's Motion for Recusal of the Trial Judge. (*See* Opinion on Motions for Recusal, March 16, 1984, attached hereto in Appendix Five).

On January 3, 1985 the court certified and granted intervention to a class of individuals described as "students, alumni, faculty and administrators of Alabama State University," represented by John F. Knight, Jr., and others. The "Knight Intervenors" sought in their Complaint in Intervention to eliminate the "vestiges of prior *de jure* segregation" alleged to be present in the three Montgomery, Alabama public institutions of higher education, Auburn University at Montgomery (hereinafter AUM), ASU and Troy State University at Montgomery by compelling the merger of all three institutions under the ASU Board of Trustees. The Knight Intervenors' allegations tracked those of the United States regarding the unnecessary duplication of academic programs and asserted that this duplication could only be eliminated through the merger they proposed.

After one and one-half years of intensive discovery, the case was tried during the entire month of July and the first week of August, 1985. The trial record consists of some 9,000 pages of transcript, and over 1700 exhibits were introduced.

On December 9, 1985, the Court entered its Memorandum of Opinion and Order, which concluded "that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; that in other respects, the 'root and branches' of the dual system have not been eliminated." (Opinion at 2). The court ordered the "Defendant State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority [to] submit to the court not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama." The court's Order specified that within fifteen days the "affected institutions" will submit their "comments or objections" to the plan in twenty-five pages or less (Order at 2).

In its Opinion, the trial court declared no longer viable the United States Supreme Court decision in *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F.Supp. 734 (M.D. Ala. 1968), *aff'd.* 393 U.S. 400 (1969), which has not been overruled and which establishes duties and principles of law in relation to desegregation in higher education that are irreconcilable with the district court's Order.[6]

II. REQUEST FOR STAY IN THE DISTRICT COURT.

Auburn petitioned the District Court for the Northern District of Alabama for a stay of its Order on February 7, 1986, two days after filing its Notice of Appeal. The District Court has failed to afford the relief requested and has denied, without opinion, motions of the University of Alabama and the State of Alabama for a stay of execution of the Order in conjunction with their requests for certification of controlling questions of law pursuant to 28 U.S.C. § 1292(b), which were

[6]*See* pp. 15-18, *infra*. In rejecting a challenge to the creation and operation of AUM, the *ASTA* court also sanctioned the operation by AUM of academic programs in business and education. In disregard of *ASTA*, the court below found that these programs unnecessarily duplicate similar programs at ASU. *See ASTA*, 289 F.Supp. at 788.

also denied by the Court, without opinion. In its present posture, further delay by Auburn in filing the instant motion while awaiting favorable action on its petition with the trial court is not practicable because the need for relief is immediate and because the prior actions of the district judge indicate the improbability of a stay by the trial court of its own Order. *See e.g. McCoy v. Louisiana State Board of Education,* 332 F.2d 915 (5th Cir. 1964).

III. IRREPARABLE HARM AND THE PUBLIC INTEREST.

The trial court's Opinion and Order have caused and will cause irreparable harm to Auburn if not stayed pending appeal because of its drastic and wide-ranging condemnation of Auburn's policies and programs. The mere existence of the Opinion and Order, and the publicity attendant thereto, is disruptive to Auburn's current and prospective students, faculty and staff, as well as scientists in the Alabama Agricultural Experiment Station and employees of the Alabama Cooperative Extension Service, because it casts grave doubts on the continued viability of Auburn's curriculum, high academic standards, and public service function.

The necessary and logical conclusion of the trial court's Opinion and Order is that Auburn's supervision and control of the Alabama Cooperative Extension Service and the Alabama Agricultural Experiment Station will somehow be substantially altered (Opinion at 56, 60-62),[7] and that education

[7]A&M's Amended Claims (*See* Appendix Three) seek the fragmentation of the ACES and AAES so that A&M has control of both organizations in the northern thirty-three counties of Alabama. The district court apparently intends to so divide ACES and AAES (Opinion at 56, 60-62) in spite of the evidence that no state so divides such agencies and the uncontradicted testimony of the Vice-President, Emeritus for Agriculture at Ohio State University and the Dean of Agriculture and Director of Extension and Research at Cornell University that for scientific and economic reasons, administrative responsibility for such state agencies should not be divided. (Trial testimony of Roy Kottman and Dr. David Call).

and business programs at AUM will be substantially altered because of the court's finding that they unnecessarily duplicate programs at ASU (Opinion at 75). This prospect creates many uncertainties – the possibility of lost jobs and tenure for administrators, teachers and scientists and the possibility that students may not graduate in the institutions of their choice if they remain in the programs in which they are currently enrolled or intend to enroll – and is doing irreparable and irreversible harm to Auburn University every day during which the court's Opinion continues to be viable authority. This problem is seriously compounded by the trial judge's gratuitous and erroneous statements that "Black student participation in campus life and activities at Auburn is at a lower level than that of any other state supported institution," (Opinion at 73) and that "Auburn's racial attitudes have changed little since the fifties." (Opinion at 73-74).[8] Such rhetoric seriously handicaps Auburn's attempts to recruit qualified black faculty and students. Once potential faculty members or prospective students have chosen another institution, they are lost to Auburn forever.

The Memorandum of Opinion declares that the Alabama constitutional provision vesting sole management and control of Auburn in its Board of Trustees is violative of the fourteenth amendment to the United States Constitution (Opinion at 91). Then, in ordering the state defendants to formulate a plan, the Order subordinates Auburn's Board of Trustees to the state defendants, contrary to the Alabama Constitution of 1901 and in violation of the tenth amendment to the United

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[8]The only evidence on the participation by blacks in student life at Auburn came from former Auburn students Cheryl Harvey and Abbie Hockaday, both of whom testified that they had experienced no impediment to campus life or student activities. (*See* Transcript of Harvey and Hockaday testimony, attached hereto in Appendix Six). That Auburn's racial attitudes *have* changed since the fifties is established by uncontradicted evidence that Auburn actively recruits minority students and faculty. (*See* Deposition of Herbert N. Hawkins, Auburn trial Exhibit 5947, and Auburn Trial Exhibit 8221, all attached hereto in Appendix Six).

States Constitution (Order at 1). Because Auburn's business relationships and educational policy have traditionally been predicated upon its constitutional autonomy, the abolition of this authority could seriously erode the ability of Auburn to conduct day-to-day business, academic affairs, and educational policy.

The court has declared Auburn's use of American College Testing Program (ACT) scores in admissions decisions violative of Auburn's duty to desegregate. This conclusion is based not only upon an erroneous application of relevant legal principles but also upon a total disregard of uncontradicted testimony proving Auburn's use of the ACT to be academically sound and constitutionally permissible.[9] Nevertheless, the mere suggestion in the Opinion that Auburn must dilute its admissions standards is working irreparable damage to Auburn by discouraging superior students, black and white, from selecting Auburn.

The trial court's Opinion and Order will force drastic changes in the academic policies, programs and reputation of Auburn. The expectation of these changes is already damaging Auburn because of the fears of current and prospective students that they will not be able to graduate from the same institution and in the same program in which they matriculated. The difficulty of returning an organization ordered to be drastically altered to its former status in the event of reversal has been considered an important factor in determining whether a stay pending appeal shall be granted. *See, e.g., United States v. First City National Bank,* 386 U.S. 361, 370-71 (1967) (difficulty of "unscrambling" merged institutions cited as ground for stay); *International Boxing Club v. United States,* 2 L.Ed. 2d 15, 78 S.Ct. 4 (1957) (Harlan, J., Circuit Justice). Since a stay is necessary to prevent this harm, the proper time for the

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[9]*See* p. 34, *infra; see Regents of University of Michigan v. Ewing,* 54 U.S.L.W. 4055 (1985) ("Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university.").

Court of Appeals to act is now, before the proceedings below have gone any further.[10]

Conversely, preservation of the status quo pending appeal would not harm the plaintiffs or the public interest in the event the trial court's decision is affirmed. There is no evidence that anyone is being denied the benefits of any program because of race (*See* notes 3 and 8, *supra* and notes 15 and 20, *infra.*), and the institutional defendants are not legally subject to injury. Review prior to the initiation of expensive discovery and hearings concerning the elements of the plan might avoid the expenditure of public funds on litigation. The balance of the equities clearly favors a stay.

IV. LIKELIHOOD OF SUCCESS ON THE MERITS.

The law of this circuit is that an applicant for a stay of a district court judgment "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) *cert. denied* 103 S. Ct. 1438, ... U.S. ....., 75 L.Ed. 2nd 795 (1981). The grounds for Auburn's appeal will be embraced in two general headings, *viz.*; (1) errors in the court's legal conclusions[11] and evidentiary findings and (2) error in denying Auburn's recusal motion under the facts as set out in Auburn's 28 U.S.C. § 144 affidavit and as presented at the hearings on recusal.

Auburn will establish that the district court's Opinion applies incorrect legal principles, because it fails to follow a

[10]Stay of further proceedings below is necessary only if the trial court disregards Auburn's Notice of Appeal, in which case stay would avoid proceedings on a writ of prohibition, *see* note 1, *supra*, or if this court notes jurisdiction of Auburn's appeal only

[11]Whether the trial court is bound by the *ASTA* decision and whether the trial court has jurisdiction of claims relating to the AAES and ACES given the program-specific limitations of Title VI are among issues that have not been previously decided by this court and which justify a stay of the trial court's Order. *See Corpus Christi-Independent School Dist. v. Cisneros* (Black, J., Circuit Justice), 404 U.S. 1211 (1971).

decision by the United States Supreme Court involving the identical issues and virtually the same parties, fails to follow decisions of this circuit dealing with the fourteenth amendment rights of state agencies, fails to follow decisions of the United States Supreme Court and this circuit dealing with the "program-specific" requirements of Title VI; and is clearly erroneous because the evidence presented during the trial of this action established that race played no part in the adoption of the Alabama constitutional provisions vesting management and control of Auburn University and the University of Alabama in their respective Boards of Trustees, that AUM has been a race-neutral institution since its creation, that Auburn's status as administrator of the Alabama Agricultural Experiment Station and the Alabama Cooperative Extension Service has nothing to do with race, that Auburn's use of the ACT test in its admissions process is valid and legitimate, and that Auburn actively recruits black faculty.

Auburn will also establish that the denial of its motion for recusal of the trial judge was based upon a failure of the court below to follow the express legal conclusion of this court that Auburn's affidavit, pursuant to 28 U.S.C. § 144, set forth "sufficient factual allegations to require that the judge shall proceed no further therein." Additional factual support for the trial judge's disqualification, discovered since Auburn's motion was overruled, provides further support for the contention that the trial judge is biased against Auburn as well as against others for whose actions the United States contends Auburn is to be held accountable.[12]

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[12]The United States has never cited or relied on "institutional" violations of Title VI; indeed, the Department of Education investigation found none. Rather, the United States has focused throughout on an approach that disregards institutional innocence, contrary to *Grove City v. Bell*, 465 U.S. _____, 79 L.Ed.2d 516, and for that reason bias of the trial judge for or against any institution, agency or official of higher education in Alabama has the potential to impact upon Auburn University under the United States' approach to this case.

A. The *ASTA* Decision Is Binding Upon The Court As *Stare Decisis* And Bars, Under The Doctrines Of *Res Judicata* And Collateral Estoppel, Relitigation Of The Claim That AUM Unconstitutionally Impedes The Desegregation of ASU.

1) *Stare Decisis.*

In making its finding of liability, the district court expressly disregarded[13] the teachings of *Alabama State Teacher's Association v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D. Ala. 1968) *aff'd* 393 U.S. 400 (1969) (*ASTA*). The importance of *ASTA*, a decision of a three-judge court from the Middle District of Alabama that was summarily affirmed, is twofold. First, the *ASTA* court established broad, binding precedent on the nature and scope of the affirmative duty to disestablish a former dual system of public higher education. In rejecting contentions by a coalition of black plaintiffs affiliated with ASU[14] that the creation of

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[13]*Citing Hardwick v. Bowers*, 760 F.2d 1202, 1207 (11th Cir. 1985), the trial court held that "doctrinal developments," consisting of summary affirmance of the United States Supreme Court; *Board of Visitors v. Norris*, 404 U.S. 907 (1971); a decision of the Sixth Circuit Court of Appeals, *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), *cert denied*, 444 U.S. 886 (1979); and another decision of a three-judge district court; *Lee v. Macon*, 317 F.Supp. 103 (M.D. Ala. 1970), were sufficient indications of a change in the law to reject the teachings of *ASTA*. Opinion at 95. *Hardwick*, however, does not support the court's conclusion because it holds that a lower court may decline to follow a summary affirmance of the Supreme Court only when the *Supreme Court* has indicated a change of position in "a *decision announced in a written opinion after consideration of briefs and oral argument.*" None of the "doctrinal developments" cited by the trial court satisfy this standard.

An additional reason cited by the court for rejecting *ASTA* was that the United States Office of Education now "requires" more than race-neutral admissions, something HEW did not do at the time of *ASTA*. As a matter of fact, reference to these "newer standards" relied upon by the court in its order were stricken on January 17, 1986 as minimum standards for the plan when all parties pointed out to the court that they had no legal effect.

[14]*See* footnote 18, *infra.*

AUM[15] would impede the desegregation of ASU, and thus be inconsistent with the affirmative duty to desegregate, the *ASTA* court held:

> "As long as the state and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied."

289 F.Supp. at 789-80.

The *ASTA* court distinguished the case before it from cases involving the desegregation of primary and secondary schools, holding that fundamental differences in diversity of goals, programs, teacher training and living arrangements between primary and secondary schools on the one hand and colleges on the other compelled a narrowing of the scope of the duty to desegregate in the higher education context. *See* 289 F.Supp. at 287. These primary and secondary school desegregation decisions, which cast "doubt on the continued viability of freedom of choice in the public schools," do not apply "to the operation of an education system on a college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps perform an important function, *viz.*, fitting the right school to the right student." 289 F.Supp. at 790.[16]

The trial court in the instant action concluded that it was not bound by the summary affirmance of the United States Supreme Court in *ASTA* and held, in effect, that race-neutral admissions and hiring are insufficient to fulfill an institution of higher education's duty to desegregate. If this conclusion is

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[15]AUM was created after legal segregation ended in Alabama. It has never discriminated in hiring or admissions on the basis of race and it is one of the most integrated institutions of higher education in the state (Opinion at 74).

[16]*ASTA* is a particularly strong precedent in connection with the claims relating to AUM in this case since the parties, issues and facts are, for all practical purposes, identical.

in error, as Auburn contends, then the court's Opinion and Order fall.

Even if the district court is correct in saying that the law of desegregation in the higher education context has changed since the time of *ASTA*, the decision still has great significance, because it binds the court under the doctrines of *res judicata* and collateral estoppel as to the claims raised by the plaintiffs concerning the effect of AUM on the desegregation of ASU.[17]

ii) *Res Judicata.*

The elements necessary to establish a *res judicata* defense were present in the court below as to the claims related to AUM. First, the claims in *ASTA* are indistinguishable from the claims in the instant case. Both cases involve the basic claim that the existence and operation of AUM violates the "duty" to dismantle the formerly segregated "dual system" of higher education and impedes the ability of ASU to desegregate. The claims in both cases arise from the "same nucleus of operative facts" (the creation and operation of AUM and its alleged affect on Alabama State); the rights claimed in both suits are the same (the right to have the alleged vestiges of segregation removed from Alabama State University and from the "system" of higher education in Alabama); the claimed wrongs are the same (the existence and operation of AUM impeding the ability of Alabama State, and thus the "system," to desegregate); and the relief sought is the same (prohibition, limitation or elimination of the existence of AUM). *See*

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[17]Under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties or those so closely aligned with their interests as to be their virtual representatives from relitigating issues that were or could have been raised in that action. *See Delta Airlines, Inc. v. McCoy Restaurants, Inc.*, 208 F.2d 582, 583 (11th Cir. 1983); *Aero-Jet General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1925). Under the doctrine of collateral estoppel, once the court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *See Alan v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147 (1979).

Woods Exploration and Producing Company v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971).

The second level of analysis of Auburn's *res judicata* defense to the AUM-related claims concerns the parties. The analysis discloses that, while the parties in *ASTA* and in the present case are not identical, they are so closely aligned in interest that *res judicata* should clearly be applied.[18]

The claims of ASU and the Plaintiffs-Intervenors — who technically were not parties in *ASTA* — are barred because their interests were adequately represented in the *ASTA* proceedings. ASU, in particular, had extensive representation in *ASTA*. For example, Dr. Joe Reed, a named Plaintiff in *ASTA*, was identified in the *ASTA* complaint as "an alumnus of Alabama State." Reed, who was also the Executive Secretary of the Alabama State Teacher's Association (another *ASTA* Plaintiff whose membership, according to the *ASTA* complaint, consisted primarily of graduates of Alabama State), selected the lawyers to represent the *ASTA* Plaintiffs and was their principal contact throughout that litigation. In the present case, Reed — now a member of ASU's Board of Trustees — has been actively involved in the direction and control of the claims made by ASU and the Plaintiffs-Intervenors (Deposition of Robert A. Dentler, pp. 48-49, Auburn Exhibit 8087A, attached hereto in Appendix Seven). Exactly the same theories advanced directly by ASU in this case were advanced on behalf of ASU in the *ASTA* case by Reed and the other Plaintiffs, who were all closely affiliated with ASU. Further, the principal witness for the Plaintiffs at the *ASTA* trial was Dr. Levi Watkins, then President of Alabama State; and the same lawyer represented the Plaintiffs in *ASTA* and Alabama State in the present case.

Similarly, the interests of the present Plaintiffs-Intervenors and the class they represent (graduates of ASU, black students

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[18]*See Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975) ("Under federal law of *res judicata*, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.")

or potential students in the Montgomery area, and potential black employees of the Montgomery institutions), were represented by the named Plaintiffs in *ASTA,* who included alumni, students and supporters of Alabama State representing "that class of race or person commonly designated and referred to as Negroes." Thus, not only were the named Plaintiffs in the two cases virtualy identical, so also were the plaintiff classes. (*See* Appellant's Jurisdictional Statement in *Alabama State Teachers Association v. Alabama Public School and College Authority* in the Supreme Court of the United States, attached hereto in Appendix Seven).

Finally, the record will show that ASU and the Plaintiffs-Intervenors pursued the present litigation jointly and cooperatively, which makes it even more appropriate to apply the *res judicata* bar to both.

iii) Collateral Estoppel.

The doctrine of collateral estoppel, which bars relitigation of issues previously decided adversely to the party against whom the doctrine is asserted, would work to bar the AUM-related claims if the claims in the instant case were determined to be upon a "different cause of action but which involved issues actually litigated and necessary to the outcome of the first action." *See Parklane Hosiery Company v. Shore,* 439 U.S. 322, 326, n. 5 (1979). If, for instance, ASU and the Knight Intervenors argue that *res judicata* is inapplicable because *ASTA* and the present suit involved different claims or causes of action, collateral estoppel would nevertheless preclude litigation of certain key factual and legal issues upon which the plaintiffs would have to prevail in order to be entitled to any judicial relief.[19]

[19]Collateral estoppel would, for example, bar re-trial of the basic issue of whether the creation and operation of AUM violates whatever duty

In summary, while it is not necessary to resort to the collateral estoppel doctrine to establish a defense, it would be appropriate to do so. And, regardless of the preclusion doctrine applied, the result is the same — the AUM-related claims and contentions are barred.

B. The District Court Lacked Jurisdiction Over Claims Concerning Auburn's responsibility For The Administration Of The Alabama Cooperative Extension Service And The Alabama Agricultural Experiment Station.

The AAES and the ACES were established in 1883 and 1915, respectively, by the State of Alabama and responsibility for their administration was vested in Auburn University. Both organizations receive federal financial assistance administered by the Department of Agriculture, which is responsible for insuring their compliance with Title VI of the Civil Rights Act of 1964. Neither organization receives federal financial assistance under statutes administered by the Department of Education nor does the Department of Education have Title VI administrative authority with respect to them. (*See* 34 C.F.R. Part 100; 7 C.F.R. Part 15, attached hereto in Appendix Nine).

This action was commenced by the Attorney General and the United States Department of Justice by virtue of a finding by the United States Department of Education

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might exist to disestablish and dismantle the former "dual system" of higher education, an issue addressed and decided in *ASTA*. Similarly, the present complainants may not relitigate the previously-decided issue of whether AUM's existence and operation, including its offering of education and business pograms, which were held unnecessarily duplicative by the court below, unlawfully impede the ability of ASU, and thus the state, to desegregate its higher education facilities. On a slightly different level, ASU and the Knight Intervenors cannot try again to litigate the issue of the intent behind the establishment of AUM, an issue addressed by the *ASTA* court and specifically decided adversely to the *ASTA plaintiffs*. See 289 F.Supp. at 788-89.

that "the State of Alabama has violated Title VI by failing to eliminate the vestiges of its dual system of higher education."[20] That finding was based upon an investigation by the Department of Education's Office of Civil Rights that *did not* include a review of the ACES or AAES. (*See* Auburn Trial Exhibit 8041J, included in Appendix Eight.) On January 4, 1982, the Department of Education requested the Department of Justice to commence the present action to effect compliance pursuant to Department of Education regulations at 34 CFR § 100.8 (a) (d) (Appendix Eight). This regulation, by its terms, applies only to programs to which federal financial assistance is authorized to be expended to a recipient under a law ad-

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[20]Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (d) *et seq.*, provides at 42 U.S.C. § 2000 (d-1), that compliance with Title VI may be effected by either: (1) the termination of financial assistance to any program or activity found to be in noncompliance with the requirements of Title VI or "(2) by another means authorized by law: *provided however* that no such action shall be taken *until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.*" (Emphasis added.) Title VI and the agency regulations promulgated for its enforcement require findings of violations in particular programs operated by the recipient of federal financial assistance. *See Grove City College v. Bell*, 465 U.S. _____, 79 L.Ed.2d 516, 531 (1983); *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1075 (5th Cir. 1969).

The Department of Education investigation that precipitated this action focused neither on whether particular programs that receive federal financial assistance were in violation of Title VI nor whether particular recipients of federal financial assistance, the individual institutions, were guilty of Title VI violations. (*See* Auburn's Amended Statement of Undisputed Facts, No. 256 A&M, attached hereto in Appendix Four). The trial court refused to allow discovery of whether the Department of Education investigation found individual institutions innocent of Title VI violations. The Northern District of Georgia, however, during depositions in Atlanta, forced the United States to produce the documentation of its investigation. This documentation indicated that no violations were found in specific programs or at any specific institutions. (*See* Auburn's Amended Statement of Undisputed Facts, No. 59).

ministered by the Department of Education. *See* 34 CFR § 100.2 (Appendix Eight). The referral could not have included findings relative to the AAES or ACES.

The regulations promulgated by United States Department of Agriculture pursuant to Title VI, at 7 CFR Part 15 (Appendix Eight), also provide that before Title VI enforcement proceedings are commenced by the Department of Justice against a recipient of federal financial assistance under a statute administered by the Department of Agriculture, the Secretary of Agriculture must determine that the recipient is not in compliance and that compliance cannot be secured by voluntary means. 7 CFR § 15.8 (d) (Appendix Eight). The United States Department of Agricultural has made no determination that the ACES or AAES are being operated in violation of Title VI. Neither has the Secretary of Agricultural requested the Department of Justice to proceed against Auburn because of any failure of the AAES or ACES to comply. (*See* United States Responses to Auburn's Request for Admissions, Auburn Trial Exhibit 5672, Nos. 19-21, attached hereto in Appendix Four). Indeed, the Department of Agriculture has found the AAES to be in compliance with Title VI on each occasion in which the Department has conducted a compliance review, (*See* Deposition of Curtiland Deville, Auburn Trial Exhibit 5921, at pp. 15-23, 79, attached hereto in Appendix Eight), and the ACES is in full compliance with court-ordered desegregation by the United States District Court for the Middle District of Alabama in the case of *Strain v. Philpott,* CV-840-E.[21] 42 U.S.C. § 2000 (d), 2000 (d-1) and the regulations promulgated thereunder by the various federal departments charged with enforcing those statutes, clearly limit the re-

[21]The ACES continues to be subject to the jurisdiction of the court in *Strain v. Philpott* (Appendix Eight).

quirements of Title VI of the Civil Rights Act of 1964 to specific "program[s] or activity[ies] receiving federal financial assistance." *See Grove City College v. Bell,* 465 U.S. ____, 79 L.Ed. 2nd 516, 531 (1984) (*"Grove City"*). Logically, any relief ordered under those statutes must be tailored to the specific program or activity found to be in violation of the statute – violations found in one program do not trigger relief against other programs. *See Grove City* at 79 L.Ed. 2d 531; *Board of Public Instruction v. Finch,* 414 F.2d 1068 (5th Cir. 1969). Because the agency responsible for compliance by the AAES and ACES with Title VI has made no determination that they are in non-compliance and has not referred any matter relating to Auburn, the AAES or the ACES to the Department of Justice with a recommendation that it institute enforcement proceedings; the program-specific limitations of Title VI deprive the United States of authority, jurisdiction or standing under Title VI of the Civil Rights Act of 1964 to challenge the organization, policies or practices of Auburn with respect to the AAES or ACES. *See* 7 CFR Section 15.8; *Finch,* 414 F.2d at 1076. Absent such statutory authority, the United States may not assert its fourteenth amendment claims. *See United States v. City of Philadelphia,* 644 F.2d 187 (3rd Cir. 1980). Since the United States is without authority to challenge these programs, the trial court had no jurisdiction to deal with such programs in its Opinion and Order.[22]

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[22]The only other plaintiff to assert claims related to the ACES and AAES was A&M, which, because it is an entity of the State of Alabama, has no rights under the fourteenth amendment upon which to base its claims. *See* pp. 28-30, *infra.*

C. The Plaintiffs Are Barred By The Doctrine of *Res Judicata* From Asserting Claims In This Action Relating To The Organization, Policies Or Practices Of The Alabama Cooperative Extension Service.

Since 1971, the ACES has been operated pursuant to court order in the action of *Strain, et al. v. Philpott, et al.*, CV-840-E in the Middle District of Alabama. In *Strain*, the United States alleged that the elimination by Auburn of the former "negro branch" of the ACES failed to eliminate the vestiges of racial segregation in the provision of agricultural extension services. The court characterized the issues and claims as, inter alia:

> The thrust of plaintiffs' Complaint is: (1) that ACES has provided and continues to provide its services on a racially segregated and discriminatory basis; (2) that the ACES has discriminated and continues to discriminate against Negroes in hiring and promotion and in terms and conditions of employment; . .

The court entered a decree in *Strain* designed to not only "prohibit discrimination" but also to "prescribe procedures designed to prevent discrimination in the future and eliminate the effects of past discrimination." (*Strain* Opinion of September 1, 1971, Auburn Trial Exhibit 8041K, at p. 13, attached hereto in Appendix Eight). The decree entered by the court ordered ACES to, *inter alia*, make such organizational changes as are necessary to eliminate any segregation in the provision of extension services to the public and any discrimination in hiring and promotion practices. (*Strain*, Decree of September 1, 1971, Auburn Trial Exhibit 8041C, attached hereto in Appendix Eight).

The plaintiffs in *Strain* included a class described as "all

Negro citizens[23] of the State of Alabama" and the Attorney General of the United States. The defendants included Auburn University's president, its Board of Trustees, and the director of the Alabama Cooperative Extension Service.

The *Strain* court, in numerous opinions since the entry of its initial opinion and decree, has held the ACES to be in full compliance with its prior orders requiring elimination not only of current discrimination on the basis of race, but also the effects of prior discrimination. (*See* Order of February 14, 1972, Auburn Trial Exhibit 5827; Order of June 11, 1976, Auburn Trial Exhibit 5857; Order of June 10, 1977, Auburn Trial Exhibit 8041I; Order of April 22, 1981, Auburn Trial Exhibit 5861; all attached hereto in Appendix Eight). The organizational structure of the ACES, which the district court Order found to be racially tainted was approved by the court in *Strain* on June 11, 1976, with the consent of the United States. (*See* Order of June 11, 1976).

Claims relating to the alteration of the ACES' organizational structure, and the relief ordered by the court, are clearly barred by the *Strain v. Philpott* proceedings under the doctrine of *res judicata*.[24] The proper forum for these claims is in the Middle District of Alabama in the *Strain* court. The Court's consideration of the claims below is, therefore, in error.

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[23]If, as A&M contends, it is entitled to protection under the fourteenth amendment and Title VI, then it follows that it was a member of the plaintiff class in *Strain*. A&M's position that it is a "person" within the meaning of the fourteenth amendment and Title VI is predicated upon its characterization of itself as a "black institution." It may not claim to have the same rights as a black person and, at the same time, claim it was not a member of the plaintiff class in *Strain*.

[24]*See* note 17, *supra*.

D. As Instrumentalities Of The State Of Alabama, ASU And A&M Have No Rights Under The Fourteenth Amendment Of The United States Constitution, 42 U.S.C. § 1981, 42 U.S.C. § 1983 or Title VI Of The Civil Rights Act of 1974.

In their Complaints, and in every statement of position throughout this action, A&M and ASU have asserted that they, as institutions, have been discriminated against by the defendants. This is evidenced, for example, by Exhibit One to ASU's Motion for Realignment which states that "the Board of Trustees of [ASU] reaffirms the position that seniority of [ASU] as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan," and by Paragraph 23 of A&M's Amended Claims where it seeks its own right to equality with Auburn University, to "large sums of money," to "enhancement" and to be an "equal partner" with Auburn in the AAES and the ACES.[25] (*See* ASU Motion for Realignment and A&M Amended Claims, both attached hereto in Appendix Three).

Because they are instrumentalities of the State, ASU and A&M have no rights under the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1981, § 1983 or Title VI of the Civil Rights Act of 1964. *See e.g. Trenton v. New Jersey,* 262 U.S. 182 (1923); *Drayden v. Needville Independent School District,* 642 F.2d 129 (5th Cir. 1981); *Appling County v. Municipal Electric Authority of Georgia,* 621 F.2d 1301 (5th Cir.) *cert denied,* 449 U.S. 1015 (1980); *Triplet v. Tiemann,* 302 F.Supp. 1239 (Neb. 1969).

The United States Supreme Court's holding in *Monell*

[25]In response to the State of Alabama's interrogatory, A&M stated that the basis for bringing this action pursuant to 28 U.S.C. § 1983, is that it is a "beneficiary protected by § 1981 and § 1983 in that it is a traditionally black institution."

v. New York City Department of Social Services, 436 U.S. 658 (1978), that political subdivisions of states could be *sued* under 28 U.S.C. § 1983, which has been repeatedly relied upon by A&M and ASU and which was cited by the trial court for the proposition that A&M and ASU *do* have constitutional rights, has no relevance to this issue. In *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir.), *cert denied* 449 U.S. 1015 (1980), the old Fifth Circuit Court of Appeals, faced with the claim by a political subdivision of the State of Georgia against another agency of that state, held as follows:

> "The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amendable to suits brought under that section. The *Monell* decision does not call into question the principal that a city or county cannot challenge a state statute on federal constitutional grounds."

621 F.2d at 1308. *See also Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Title VI prohibitions are identical to those of Fourteenth Amendment); *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981) (Title VI is intended to protect rights of "individual citizens").

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) is cited by the plaintiffs and relied upon by the trial court in holding that A&M and ASU are "persons" within the meaning of 42 U.S.C. § 1983. *Washington*, however, does not address the question presented here, whether institutions, as such, have fourteenth amendment rights. The fact situation in *Washington*, fits neatly into the category of cases represented by the *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (5th Cir. 1956) and *Akron Bd. of Ed. v. State Bd. of Ed. of Ohio*, 490 F.2d 1285 (6th

Cir.), *cert. denied,* 417 U.S. 932 (1974), which hold that local school boards have standing, in the Article III sense, to sue the state in order to protect the rights of their students from state legislation that would have a segregative effect and that would place board members in the position of violating either state law or the Federal Constitution. These cases do not hold that the school boards themselves have fourteenth amendment rights and are inapposite to the issue raised here.

E. The Trial Judge Should Have Been Disqualified.

In ruling on Auburn's Petition for a Writ of Mandamus disqualifying the trial judge, the Eleventh Circuit held that Auburn's affidavit pursuant to 28 U.S.C. § 144 "sets forth sufficient factual allegations to require that the judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144. The Court noted in a footnote that it, in ruling on Auburn's Petition, had to accept the allegations of the affidavit as true. The Court remanded the matter for proceedings before another trial judge, apparently for the purpose of determining whether the allegations were true, since its decision that the affidavit set forth sufficient factual allegations to require the trial judge to be disqualified left no legal issues to be decided. The record will demonstrate that the judge who eventually denied Auburn's motion, Judge David W. Dyer, did not find that the facts presented in the § 144 affidavit were untrue but, rather, held that the affidavit did not set forth factual allegations sufficient to require the recusal of the trial judge, contrary to the holding of this Court.[26] Failure to follow the "law of the

[26] Judge Dyer stated in his opinion that "the averments of the affidavits are insufficient, as a matter of law, to require disqualification under § 144." *See* Opinion on Motions for Recusal, March 16, 1984 at 2; attached hereto in Appendix Five).

case" in this manner was reversible error on the part of the court below.

Subsequent to the proceedings on Auburn's motions for disqualification, in June of 1984, the United States District Court for the Northern District of Georgia compelled the United States to produce documents requested by Auburn during depositions of United States Department of Education personnel in Atlanta. These documents included a newspaper clipping, Exhibit A to Auburn's Notice of Appeal, which relates the trial judge's actions while a member of the Alabama State Senate in leading a filibuster, on racial grounds, in opposition to the appointment of a white person as a member of the Board of Trustees of predominantly black ASU. The existence of this document was unknown to this defendant at the time the recusal motions were being considered, and it is obviously relevant on that issue.[27]

F. The Trial Court Based Its Opinion And Order On Clearly Erroneous Findings Of Fact.

Although Auburn takes issue with many of the court's findings of fact,[28] Auburn takes special exception to three

[27]It is also relevant on the merits. Dr. Steven Wright, a United States expert witness, gave opinion evidence that racial integration of institutional governing boards is important to the elimination of racial identifiability of student bodies. The article was made an exhibit to Dr. Wright's Deposition, but the trial court refused to permit cross-examination of the witness on this issue and refused to allow the deposition and its exhibits to be introduced into evidence at trial. In the trial court's Memorandum Opinion, the racial identifiability of institutional governing boards, including ASU's, was considered "probative" to the "question of whether the dual system has been disestablished." (Opinion at 62, 75). The fact that the "governor has generally appointed blacks to the board" was characterized as a vestige of segregation. (Opinion at 75).

[28]For instance, the court found that Auburn makes no special effort to recruit black faculty, that Auburn's attitudes with regards to integration have changed little since the 1950s, *see* note 8, *supra*, that the state's

of the Court's findings that have no support in the record and upon which the only evidence presented was contrary to the Court's finding.

First, the Court held that the difference between Auburn and A&M in the area of agricultural extension and research was principally the product of racial discrimination.[29] Dr. William Warren Rogers, the only historian to testify in the case, testified that just the opposite was true, stating that race was not a motivating factor in the legislature's assignment to Auburn of its land grant status in 1871, of the Alabama Agricultural Experiment Station in 1883 or the Alabama Cooperative Extension Service in 1915. (Dr. William Warren Rogers Deposition, Auburn Trial Exhibit 8399 at pp. 27-44, attached hereto in Appendix Eight). This testimony is uncontradicted.

Second, the Court held that the provision in the Ala-

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allocation of financial resources has disfavored A&M and ASU, that the business and education programs at AUM unnecessarily duplicate those at ASU and that the state's choice of resource allocation for physical facilities impaired the ability of ASU and A&M to attract white students, in spite of the undisputed fact that A&M and ASU have been treated as well as or better than any traditionally white institution of similar size and mission. (See Report of Douglas R. Sherman, University of Alabama Trial Exhibit 1034, attached hereto in Appendix Ten; Reports of Mary McKeown, Auburn Trial Exhibit 8358 and 1359, attached hereto in Appendix Nine). The court's finding is based upon a comparison of A&M and ASU with dissimilar institutions, contrary to the procedures of the Department of Education for Title VI investigations. (*See* Exhibit 117 to Deposition of William H. Thomas, Auburn Trial Exhibit 5922, attached hereto in Appendix Nine).

[29]This finding was based upon other clearly erroneous findings. For instance, in order to support its conclusion that A&M would have been an appropriate place to direct federal funds for agriculture, the court noted that the heaviest concentration, numbering over one hundred, of A&M's college students in 1913 were enrolled in its agricultural courses (Opinion at 31). A&M's own interrogatory answers, however, and a report of the United States Department of the Interior published in a 1916 show that A&M had *no* college students in 1913 and that of its 73 secondary students only six indicated agriculture as their chosen trade. *See* State of Alabama Exhibit 141; Auburn Ex. 5562, both attached hereto in Appendix Eight).

bama Constitution of 1901 for Boards of Trustees for the University of Alabama and Auburn, when A&M and ASU were not so provided, was racially motivated (Opinion at 91). Again, Dr. Rogers testified that there was absolutely no racial motivation behind the provision for of Auburn and University of Alabama in the constitution of 1901 and no witness testified to the contrary. (Rogers Deposition at pp. 27-44).

Finally, the trial court completely missed the mark in its finding regarding Auburn's use of ACT scores in its admissions decisions. The court found that Auburn's use of the ACT — on which blacks on average score lower than whites — was inappropriate, apparently because of evidence that a prospective student's high school grades, considered alone, are a better predictor of college success than the same student's ACT score, considered alone. However, the evidence — which consisted of the testimony of Auburn's Director of Institutional Analysis, a report prepared at Auburn concerning the validity of the ACT at Auburn, and various reports concerning the validity of the ACT generally — established without contradiction that Auburn's admission process considers the ACT score in conjunction with high school grades, and that the two taken together are a superior predictor of academic success at Auburn University — as elsewhere — than either criterion considered alone.[30] (*See* Transcript of Testimony of Gerald S. Leischuck and Auburn Trial Exhibit 7464, both attached hereto in Appendix Ten).

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[30]The Eleventh Circuit has upheld the use of standardized tests for student assignment where shown to be justified by educational necessity and where the results on such tests are not shown to be affected by past discriminatory practices. *See Georgia State Conference of Branches of NAACP v. State of Georgia,* 775 F.2d 1403 (11th Cir. 1985). Auburn's higher admissions and transfer requirements were held by the *ASTA* court to be a valid distinction between Auburn and ASU. *See* 289 F.Supp. at 789.

WHEREFORE, Auburn prays that the mandate of the the United States District Court for the Northern District of Alabama be stayed pending the decision of the Eleventh Circuit Court of Appeals on the merits of this action.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon the following attorneys by first-class United States mail, postage prepaid, on this 13th day of February, 1986:

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/s/ EDWARD S. ALLEN

Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, et al.,
Plaintiffs-Appellees,

JOHN F. KNIGHT, Jr., et al.,
Plaintiffs-Intervenors,
Appellees,

versus

THE STATE OF ALABAMA, et al.,
Defendants,

THE ALAMAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE,
State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(June 6, 1986)

Before VANCE and JOHNSON Circuit Judges, and ALL-GOOD*, Senior District Judge.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We

*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black tdults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were severed from the main state-wide action and set for later trial.

Meanwhile, during the pendency of these proceedings,

the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory – that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction

[1]In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama – sued the State of Washington under the Fourteenth Amendment. There the Supreme

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, *e.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); and *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpre-

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Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

tation — which would bar any suit by a creature of the state against its creator — has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the *Hunter* line — including *Safety Harbor, supra* — and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette,* 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied,* 444 U.S. 827 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot,* 364 U.S. 339, 344 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de

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[2]*Cf.* City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with Board of Education v. Allen, 392 U.S. 236 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1982); P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also* Aguayo v. Richardson, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974), for an indication of the confusion surrounding this issue.

novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra,* at 441 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *See also Town of Ball v. Rapides Parish Police Jury,* 746 F.2d 1049, 1051 n. 1 (5th Cir. 1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amendable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied,* 449 U.S. 1015 (1980).[4] We are bound by this decision, which ex-

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[3]By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. City of Oklahoma City v. Tuttle, _____ U.S. _____, 105 S.Ct. 2427, 2432 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

[4]*See also* Commonwealth of Pa. v. Porter, 659 F.2d 306, 327 n. 3 (3rd Cir 1981) (en banc) (standing recognized on other grounds): "[S]tates

tends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.[6] We conclude that no such right of action exists.

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were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5]Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-488 n. 31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra,* at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra,* at 479-482.

[6]We note that at least five justices determined in University of California Regents v. Bakke, 438 U.S. 265, 287 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* at 281.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams,* 760 F.2d 1158, 1163-64 (11th Cir. 1985), *cert. denied sub nom. Grimmer v. Hardin,* 106 S.Ct. 530 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[8] Two exceptions to this rule apply: (1) a

[7] *See* Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1978).

[8] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or

state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, ____ U.S. ____, 105 S.Ct. 3142, 3145 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, ____ U.S. ____, 105 S.Ct. 3099, 3106 n. 14 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, at 3107 n. 17; *Quern v. Jordan*, 44 U.S. 332 (1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra*, at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its*

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equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Hans v. Louisiana, 134 U.S. 1 (1890), established that the amendment also proscribes suits by citizens against their own state.

[9]The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the *Young* exception applies similarly in both cases.

members, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court had indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* at 3106 n. 14; *Brandon v. Holt,* 105 S.Ct. 873, 877 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. *See Monell, supra,* at 694.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman,* 569 F.2d 300, 302 (5th Cir. 1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio,* 691 F.2d 1344, 1353 (11th Cir. 1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 434 n. 7 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose,* the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order

hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.eg., Fernandez-Rogue v. Smith,* 671 F.2d 426, 429 (11th Cir. 1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner,* 343 F.2d 226, 229 (5th Cir. 1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing — particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO — is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

[10]To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. Johnson v. United States Department of Agriculture, 734 F.2d 774, 781 (11th Cir. 1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra,* at 302. *See also University of Texas v. Camenisch,* 451 U.S. 390, 395 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.,* 730 F.2d 1417, 1424 (11th Cir. 1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services,* 105 S.Ct. 249 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect on the Board's nonapproval of most of ASU's teacher education programs if ieft unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be nonexistent.[11]

[11]The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted – that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the

Given this finding by the lower court, which is entitled to substantial deference, *see Anderson v. City of Bessemer*, ____ U.S. ____, 105 S.Ct. 1504 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court — and this Court on review — to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimi-

Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

nation, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1, 15-16 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.,* 769 F.2d 311 (5th Cir. 1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.